TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 438.

THE UNITED STATES, PETITIONER,

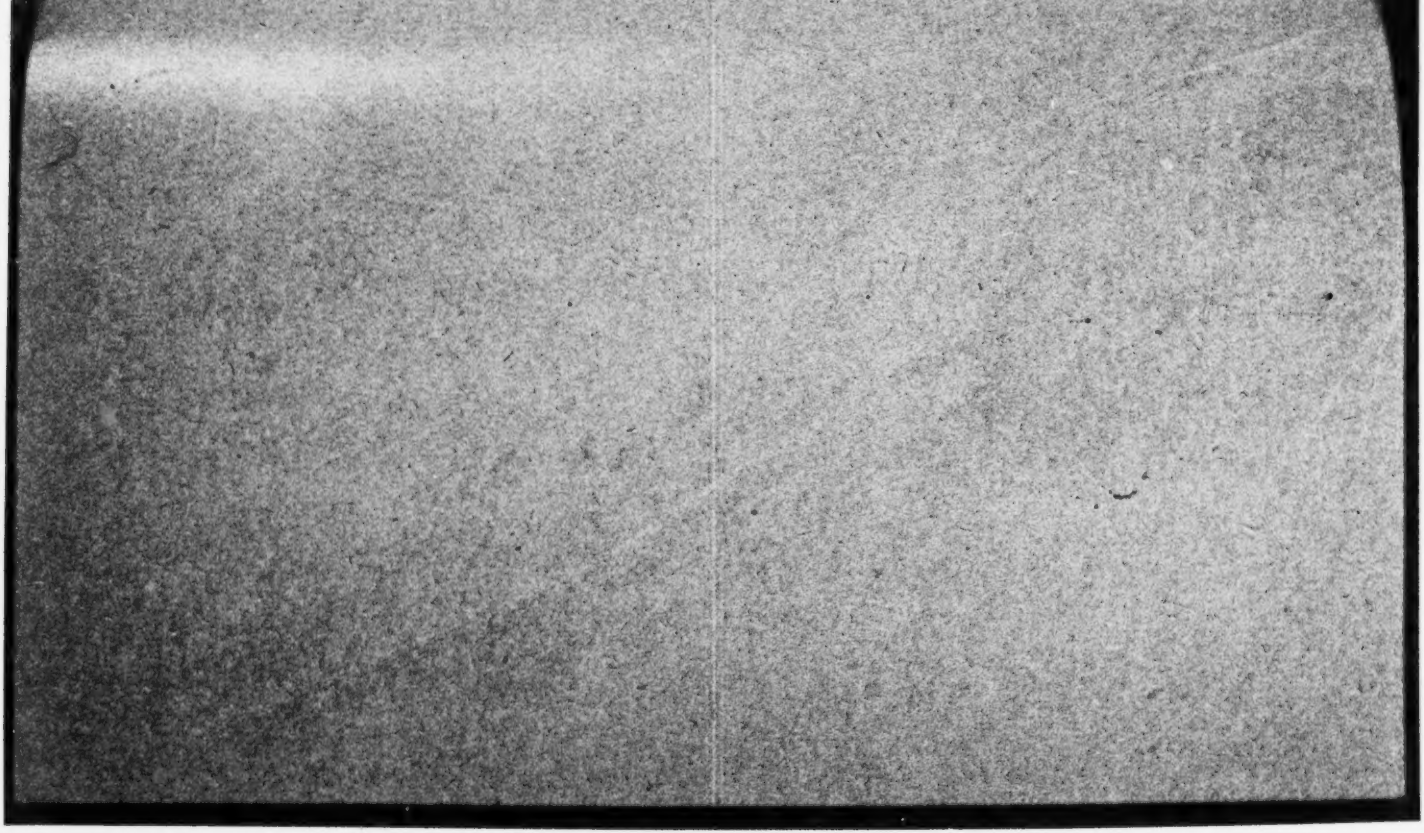
vs.

GEORGE E. CADARR, EDWARD PARKER, JOHN J. KEATING, AND JOHN N. MYERS.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

PETITION FOR CERTIORARI FILED NOVEMBER 23, 1904.
ORDER AS TO RETURN TO CERTIORARI FILED JANUARY 30, 1905.

(19538.)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No 438.

THE UNITED STATES, PETITIONER,

vs.

GEORGE E. CADARR, EDWARD PARKER, JOHN J. KEATING, AND JOHN N. MYERS.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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a *Transcript of record.*

Court of appeals, District of Columbia, January term, 1904.

THE UNITED STATES, APPELLANT,
vs.
GEORGE E. CADARR, EDWARD PARKER, JOHN J. KEATING, and JOHN N. MYERS.
No. 1325. No. 2, special calendar.

Appeal from the supreme court of the District of Columbia.

Filed May 28, 1903.
Office of the clerk, Supreme Court U. S. Received Nov. 23, 1904.

1 In the court of appeals of the District of Columbia.

THE UNITED STATES, APPELLANT,
vs.
GEORGE E. CADARR ET AL.
No. 1325.

Supreme court of the District of Columbia.

UNITED STATES
vs.
GEORGE E. CADARR, EDWARD PARKER, JOHN J. KEATING, and JOHN N. MYERS.
No. 22917. Criminal.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed, and proceedings had, in the above-entitled cause, to wit:

Aff. No. 48879.

DISTRICT OF COLUMBIA,
County of Washington, ss.

To the marshal of the district of Columbia, greeting:

Whereas George H. Harries hath, upon oath before us, judges of the police court of the District of Columbia, declared that on the twenty-second day of April, A. D. 1901, at the county and District aforesaid, one George E. Cadarr, Edward Parker, George W. Blair, John J. Keating, and John N. Myers did amongst themselves conspire, combine, confederate, and agree together falsely and fraudulently to cheat and defraud the Washington Traction and Electric Company, a body corporate, of divers large sums of money, and in pursuance of the said unlawful and malicious conspiracy, the said Cadarr, Parker, Blair, Keating, and Myers did obtain from the said Washington Traction and Electric Company one thousand dollars against the form of the statute in such case made and provided, and against the peace and Government of the United States.

You are therefore hereby commanded to take the said Cadarr, Parker, Blair, Keeting, and Myers and bring them before the said police court forthwith to answer said charge.

2 Witness the Hon. Charles F. Scott and the Hon. Ivory G. Kimball, judges of the police court, and the seal of said court this twenty-fourth day of April, A. D. 1901.

[Seal of the police court.]

W. H. RUFF,
Deputy Clerk Police Court, D. C.

(Endorsed:) Crim. No. 22917. precinct. No. 117788. United States vs. George E. Cadarr et al. Warrant for conspiracy. Cepi: J. S. Lacey, dep. U. S. M. Apr. 25, 1901. Witnesses: Geo. H. Harries, Evening Star bldg.; Oliver A. Gardener, M. R. R. *R.* Co.; Richard Williams, 1109 M St., S. E.; M. R. Muller, M. P.; Lieut. J. C. Daley, M. P.; C. C. Flather, M. P.; Henry Lacey, M. P.; George W. Boyd, M. P. Filed in open court Apr. 29, 1901. J. R. Young, clerk.

(Endorsed:) April 25", 1901. Plea, not guilty. Each held to await the action of the grand jury. Cadarr, Blair, & Myers committed to jail in default of recognizance in the sum of $1,500 each to appear in the supreme court, D. C., entered in 190 . surety. Filed Apr. 24, 1901. Joseph Y. Potts, clerk police court, D. C. Parker and Keating released on $1,500 each recognizance to appear in the supreme court, D. C., entered into April 27, 1901. Thomas Gray, W. H. Brooker, Bernard Murphy, sureties.

Recognizance.

In the police court of the District of Columbia, the 27th day of April, 1901.

THE UNITED STATES *vs.* EDWARD PARKER. } To answer in the supreme court of the District of Columbia.

The defendant and William H. Brooker, his surety, acknowledge themselves to be indebted to the United States in the sum of seven hundred and fifty dollars lawful money of the United States, to be levied of their and each of their goods and chattels, lands and tenements, upon condition, nevertheless, that if the said defendant shall personally appear before the supreme court of the District of Columbia from day to day, at the present and any future criminal term thereof, until the said cause shall *shall* be finally disposed of, and answer the charge of conspiracy against him therein preferred, and shall not depart the court without leave, then this recognizance to be void and of none effect.

W. H. BROOKER.

3 APRIL 27TH, A. D. 1901.

I certify that the above recognizance was acknowledged in open court, the 27th day of April, 1901; and that the sufficiency of said surety was approved by the judge of said police court.

Witness my hand and the seal of said court.

[Seal police court.]

JOSEPH Y. POTTS,
Clerk Poicle Court, District of Columbia,

(Endorsed:) Crim. No. 22917. No. 117,788. Police court, District of Columbia. Recognizance to answer in the supreme court. The United States vs. Edward Parker $750. Wm. H. Brooker 415 13 St. S. E. surety. Taken the 27″ day of April, 1901. Joseph Y. Potts, clerk police court, D. C.

POLICE COURT, DISTRICT OF COLUMBIA, *27″ day of April, 1901.*

William H. Brooker surety in the within recognizance, being duly sworn, says that he is worth, over and above all his debts and liabilities the sum of five thousand dollars in real estate, situated in the District of Columbia; that a part of the real property so owned by him is described as follows: Lot 22 square 1018 District of Columbia and is worth the sum of two thousand dollars. That he owns said property in fee simple, free and unincumbered by deed of trust, mortgage, judgment, or otherwise. That he is not surety nor responsible on the bond or recognizance of any person, whatsoever.

W. H. BROOKER.

Witnesses:

_____ _____.

_____ _____.

Subscribed and sworn to before me, this 27″ day of April, 1901.

JOSEPH Y. POTTS,
Clerk Police Court, District of Columbia.

Recognizance.

In the police court of the District of Columbia, the 27″ Day of April, 1901.

THE UNITED STATES *vs.* EDWARD PARKER. } To answer in the supreme court of the District of Columbia.

The defendant, and Thomas Gray his surety, acknowledge themselves to be indebted to the United States in the sum of seven hundred
4 and fifty dollars, lawful money of the United States, to be levied of their and each of their goods and chattels, lands and tenements, upon condition, nevertheless, that if the said defendant shall personally appear before the supreme court of the District of Columbia from day to day, at the present and any future criminal term thereof, until the said cause shall *shall* be finally disposed of, and answer the charge of conspiracy against him therein preferred, and shall not depart the court without leave, then this recognizance to be void and of none effect.

THOMAS GRAY.

APRIL 27TH, A. D. 1901.

I certify that the above recognizance was acknowledged in open court, the 27″ day of April, 1901; and that the sufficiency of said surety was approved by the judge of said police court. Witness my hand and the seal of said court.

[Seal police court.]

JOSEPH Y. POTTS,
Clerk Police Court, District of Columbia.

(Endorsed:) Crim. No. 22917 No. 117,788 Police court, District of Columbia. Recognizance to answer in the supreme court. The United States vs. Edward Parker $750. Thomas Gray surety 1246 1st St. S. W. Taken the 27" day of April 1901. Joseph Y. Potts clerk police court, D. C.

POLICE COURT, DISTRICT OF COLUMBIA, *27" day of April, 1901.*

Thomas Gray surety in the within recognizance, being duly sworn, says that he is worth, over and above all his debts and liabilities the sum of twenty five hundred dollars in real estate, situated in the District of Columbia; that a part of the real property so owned by him is described as follows: Lot 13 square No. 493 District of Columbia and is worth the sum of twenty five hundred dollars. That he owns said property in fee simple, free and unincumbered by deed of trust, mortgage, judgment, or otherwise That he is not surety nor responsible on the bond or recognizance of any person, whatsoever, except two bonds aggregating seven hundred dollars

THOMAS GRAY.

Witnesses:

_____ _____.

_____ _____.

Subscribed and sworn to before me, this 27" day of April, 1901.

JOSEPH Y. POTTS,
Clerk Police Court, District of Columbia.

5 *Recognizance.*

In the police court of the District of Columbia, the 27th day of April, 1901.

THE UNITED STATES *vs.* JOHN J. KEATING. } To answer in the supreme court of the District of Columbia.

The defendant and Bernard Murphy, his surety, acknowledge themselves to be indebted to the United States in the sum of fifteen hundred dollars, lawful money of the United States, to be levied of their and each of their goods and chattels, lands and tenements, upon condition, nevertheless, that if the said defendant shall personally appear before the supreme court of the District of Columbia from day to day, at the present and any future criminal term thereof, until the said cause shall *shall* be finally disposed of, and answer the charge of conspiracy against him therein preferred, and shall not depart the court without leave, then this recognizance to be void and of none effect.

BERNARD MURPHY.

APRIL 27TH, A. D. 1901.

I certify that the above recognizance was acknowledged in open court, the 27th day of April, 1901; and that the sufficiency of said surety was approved by the judge of said police court. Witness my hand and the seal of said court.

JOSEPH Y. POTTS,
Clerk Police Court, District of Columbia.

(Endorsed:) Crim., No. 22917. No. 117788. Police court, District of Columbia. Recognizance to answer in the supreme court. The United States vs. John J. Keating, 720 Light St., Baltimore, Md. $1,500. Bernard Murphy, surety, 1344 4th St. NW. Taken this 27" day of April, 1901. Joseph Y. Potts, clerk police court, D. C.

POLICE COURT, DISTRICT OF COLUMBIA,
27" day of April, 1901.

Bernard Murphy, surety in the within recognizance, being duly sworn, says that he is worth, over and above all his debts and liabilities, the sum of twenty thousand dollars in real estate, situated in the District of Columbia; that a part of the real property so owned by him is described as follows: Premises known as Nos. 402, 404, 406, 408 O street northwest, D. C., and is worth the sum of twelve thousand dollars.
6 That he owns said property in fee simple, free and unincumbered by deed of trust, mortgage, judgment, or otherwise, except a deed of trust of six thousand dollars. That he is not surety nor responsible on the bond or recognizance of any person whatsoever.

BERNARD MURPHY.

Witnesses:

_____ _____

_____ _____

Subscribed and sworn to before me, this 27" day of April, 1901.

[Seal police court.]

JOSEPH Y. POTTS,
Clerk Police Court, District of Columbia.

Recognizance.

In the supreme court of the District of Columbia, holding a criminal court.

THE UNITED STATES } *vs.* GEORGE W. BLAIR. } Criminal No. 22917. Charge, conspiracy.

The defendant and Union Surety & Guaranty Co. of Philadelphia, Pa., his surety, acknowledge themselves indebted to the United States in the sum of fifteen hundred ($1,500) dollars, to be levied of their and each of their lands and tenements, goods and chattels, if the said defendant fail to appear before this court from day to day at the present and subsequent terms thereof and answer any indictment that may be brought against him, until finally disposed of, or if the said defendant depart the court without leave.

UNION SURETY & GUARANTY CO.
OF PHILADELPHIA, PA.,
By WM. OSCAR ROOME,
Local V. Prest. and Atty. in Fact.

Acknowledged in open court before me,
[SEAL.]

J. R. YOUNG, *Clerk.*
By HARVEY GIVEN,
Assistant Clerk.

Surety examined and approved by U. S. atty. (Atkins).

(Endorsed:) Criminal court No. one. Criminal, No. 22917. United States vs. George W. Blair, Milestown, St. Mary's Co., Md. Recognizance for appearance of defendant. $1,500. Union Surety & Guaranty Co. of Philadelphia, surety. Acknowledged May 4, 1901.

7 *Recognizance.*

In the supreme court of the District of Columbia, holding a criminal court.

THE UNITED STATES } Criminal No. 22917. Charge, conspiracy.
vs.
GEORGE E. CADAAR. }

The defendant and Reuben M. Harlow, his surety, acknowledge themselves indebted to the United States in the sum of fifteen hundred ($1,500) dollars, to be levied of their and each of their lands and tenements, goods and chattels, if the said defendant fail to appear before this court from day to day at the present and subsequent terms thereof, and answer any indictment that may be brought against him; until finally disposed of or if the said defendant depart the court without leave.

Acknowledged in open court before me,

J. R. YOUNG, *Clerk*,
By F. W. SMITH,
Assistant Clerk.

Surety examined and approved by U. S. att'y.

(Endorsed:) Criminal court No. one Criminal No. 22917. United States vs. George E. Cadaar #1006 I St. S. E. Recognizance for appearance of defendant. $1,500. Rueben M. Harlow 1134 Park place N. E. surety. Acknowledged May 7, 1901.

Recognizance.

In the supreme court of the District of Columbia, holding a criminal court.

THE UNITED STATES } Criminal No. 22917. Charge, conspiracy.
vs.
JOHN N. MYERS. }

The defendant and Bernard Murphy, his surety, acknowledge themselves indebted to the United States in the sum of fifteen hundred ($1,500) dollars, to be levied of their and each of their lands and tenements, goods and chattels, if the said defendant fail to appear before this court from day to day at the present and subsequent terms thereof, and answer any indictment that may be brought against him, until finally disposed of or if the said defendant depart the court without leave.

Acknowledged in open court before me,

J. R. YOUNG, *Clerk.*
By F. W. SMITH,
Assistant Clerk.

8 Surety examined and approved by U. S. att'y (Bingham).

(Endorsed:) Criminal court No. one Criminal No. 22917. United States vs. John N. Myers 3237 P St. N. W. and No. 8 North Mount St. Balto. Md. Recognizance for appearance of defendant. $1,500. Bernard Murphy, 401 O St. N. W. surety. Acknowledged May 7, 1901.

Indictment.

Filed in open court Mar. 31, 1902.

In the supreme court of the District of Columbia, holding a criminal term, January term, A. D. 1902.

DISTRICT OF COLUMBIA, *ss:*

The grand jurors of the United States of America, in and for the District of Columbia aforsaid, upon their oath do present:

That at the time of the commission by them of the offense hereinafter mentioned, one George E. Cadaar, one Edward Parker, one John J. Keating and one John N. Myers, all late of the District aforesaid, were employees at the District aforesaid, of the Metropolitan Railroad Company, a body corporate, operating certain lines of street railway in said District; the said Cadaar being then and there in such employ as an engineer at the car-house of said body corporate at said District, and having then and there as such engineer charge of a certain furnace in the said car-house then and there being; and the said Parker, the said Keating and the said Myers being then and there in such employ as conductors on the cars of said body corporate; and that in the business of said body corporate certain tickets were used, each of which entitled the holder thereof to one ride over one of said lines or to one ride over parts of two of said lines; and that six of said tickets were sold by said body corporate through the conductors aforesaid and other conductors of the said body corporate, for the sum of twenty-five cents; and that the price of each single such ride when paid in money was five cents; and that the collections of moneys and of tickets from passengers on the said lines by the conductors of such body corporate were required to be registered by the conductors of the said body corporate at the time of the making of such collections, on a machine in the cars upon which such collections were made; and that the conductors of the said body corporate upon the collection of such tickets from passengers were required to immediately cut a hole in them, such last-mentioned tickets, with a certain instrument called a punch; and that such collections of moneys and of tickets so punched by the conductors of the said body corporate were required to be turned over by them to other servants and agents of the said body corporate at its office in the said car-house; and that such collections of moneys and of
9 tickets from passengers in each instance were required to agree with the showing made in that respect by the said machine; and that thereupon the said tickets so turned over were arranged in bundles by other servants and agents of said body corporate, and by them such last-mentioned servants and agents put in the said furnace to be destroyed by fire, so as to prevent them from being used again in any manner in the business of said body corporate; and that it was within the power of the said Cadarr as such engineer to so adjust the strength of the fire in

said furnace that when such bundles of tickets were so placed therein for destruction, many of such last-mentioned tickets could be subsequently removed from such furnace in an undamaged or slightly damaged condition, and that any conductor in the employ of said body corporate might if so disposed purposely refrain from making a hole with a punch as aforesaid, in tickets actually collected by him, such conductor last aforesaid, from passengers on cars of the said body corporate, and having in the possession of him, such conductor last aforesaid, such undamaged and slightly damaged tickets might in his accountings with the said body corporate for such collections of tickets last aforesaid, substitute such undamaged and slightly damaged tickets for tickets actually so collected by him such conductor last aforesaid, and retain the tickets actually so collected by him; and might also in his collections from such passengers of fares in money register such money collections as collections of tickets on said machine, and thereby and by returning in his said accountings with the said body corporate such undamaged or slightly damaged tickets in lieu of moneys collected by him for fares of passengers, and by sales of the said unpunched and retained tickets be enabled to defraud the said body corporate of large sums of money.

And the grand jurors aforesaid, upon their oath aforesaid, do further present: That the said George E. Cadarr, the said Edward Parker, the said John J. Keating and the said John N. Myers, well knowing the premises aforesaid, and scheming and designing to impose upon and to defraud the said body corporate of its moneys, on the twenty-second day of April in the year of our Lord one thousand nine hundred and one, and at the District aforesaid, unlawfully did combine, conspire, confederate, and agree together to obtain and acquire to themselves from the said body corporate large sums of the moneys of the said body corporate, and cheat the said body corporate of the same, and to accomplish said object in the manner following, that is to say, that he, the said George E. Cadarr, should upon occasions when such tickets should be so placed in said furnace for destruction as aforesaid, so adjust the fires of the said furnace that many of such last-mentioned tickets could be subsequently removed from the said furnace by him, said Cadarr, in an undamaged or slightly damaged condition, and that he, said Cadarr, should so remove them, the tickets last aforesaid, and that after such removal of such tickets from said furnace, he, the said Cadarr, should deliver certain of the tickets last aforesaid, which were in an undamaged or slightly damaged
10 condition, to the above-named conductors and other conductors of the said body corporate, and receive therefor from the said above-named conductors and the other conductors last aforesaid, certain sums of money to be agreed upon between him and them, in exchange for such last-metioned tickets; and that thereafter the said Parker, the said Keating, and the said Myers, in accounting with the said body corporate for sums of money and for such car tickets collected by them respectively from passengers on the cars of said body corporate of which they, the conductors last aforesaid, respectively, had charge, should return to the servants and agents of the said body corporate, in such accountings, car tickets so received by them, the conductors last aforesaid, from said Cadarr in lieu of moneys collected by them respectively from such passengers and of tickets collected by them respectively from passengers

and retain and convert to the respective uses of them, the said Parker, the said Keating, and the said Myers, such last-mentioned moneys and tickets, and thereby defraud the said company of large sums of money.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the day and year aforesaid, certain car tickets of the said body corporate were returned by the conductors aforesaid to the said body corporate in such accountings with the said body corporate, and that the tickets last aforesaid were arranged in bundles and placed in the said furnace for destruction; and that the said Cadarr did then and there, to wit, on the day and year aforesaid and at the District aforesaid, and in pursuance of the said unlawful combination, conspiracy, confederation, and agreement, and in the execution thereof and to effect the object of the same, so adjust the fire in said furnace that many of the said last-mentioned tickets should be undamaged or slightly damaged; and that he, the said Cadarr, in further pursuance of the said unlawful combination, conspiracy, confederation, and agreement, and in the further execution thereof and to further effect the object of the same, did on the day and year aforesaid and at the District aforesaid remove from the said furnace many, to wit, one thousand, of the tickets last aforesaid, in an undamaged or slightly damaged condition; and that he, said Cadarr, in further pursuance of the said unlawful combination, conspiracy, confederation, and agreement and in the further execution thereof and to further effect the object of the same, did then and there deliver to the said Parker a great number, to wit, one hundred, of the tickets last aforesaid; against the form of the statute in such case made and provided, and against the peace and Government of the said United States.

ASHLEY M. GOULD,
Attorney of the United States in and for the District of Columbia.

(Endorsed:) No. 22917. United States vs. George E. Cadarr, Edward Parker, John J. Keating, and John N. Myers. Conspiracy. Witnesses: George H. Harries, M. R. Muller, M. P., George W. Boyd, M. P. J. C. Daley, M. P., Henry Lacy, M. P., Richard Williams. A true bill. George W. Linkins, foreman.

11 *Arraignment of Cadarr, Keating, and Myers.*

SUPREME COURT OF THE DISTRICT OF COLUMBIA,
Friday, April 4, 1902.

The court resumes its session pursuant to adjournment, Mr. Justice Anderson, presiding.

* * * * * * *

UNITED STATES *vs.* GEORGE E. CADARR, JOHN J. Keating, and John N. Myers.	No. 22917. Indicted for conspiracy.

Come as well the attorney of the United States as the defendants in proper person according to their recognizance; and, thereupon, the defendants being arraigned upon the indictment, they each plead thereto not guilty and for trial put themselves upon the country and the attorney of the United States doth the like.

Arraignment of Edward Parker.

SUPREME COURT OF THE DISTRICT OF COLUMBIA,
Monday, April 7, 1902.

The court resumes its session pursuant to adjournment, Mr. Justice Anderson, presiding.

* * * * * * *

UNITED STATES, }
vs. } No. 22917. Indicted for conspiracy.
EDWARD PARKER. }

Come as well the attorney of the United States as the defendant in proper person according to his recognizance; and, thereupon, the defendant being arraigned upon the indictment he pleads thereto not guilty and for trial puts himself upon the country and the attorney of the United States doth the like.

12 *Plea of not guilty withdrawn and motion to quash filed.*

SUPREME COURT OF THE DISTRICT OF COLUMBIA,
Thursday, May 1, 1902.

The court resumes its session pursuant to adjournment, Mr. Justice Anderson, presiding.

* * * * * * *

UNITED STATES, }
vs. } No. 22917. Indicted for conspiracy.
EDWARD PARKER. }

Now comes here the defendant by his attorneys, Messrs. H. P. Gatley and Joseph Shillington, and withdraws his plea of not guilty and files a motion to quash the said indictment.

Motion to quash indictment—Filed in open court May 1, 1902.

In the supreme court of the District of Columbia, holding a criminal court.

UNITED STATES, }
vs. } Criminal No. . Indicted for conspiracy.
EDWARD PARKER ET AL. }

Now comes the defendant Edward Parker, by his attorneys, H. Prescott Gatley and Joseph Shillington, and moves the court to quash the indictment herein exhibited against him for the following reasons:

1. Because the said indictment was not returned into court within nine months after the 25th day of April, A. D. 1901, on which said day this defendant was held to bail to await the action of the grand jury on said charge of conspiracy; the time for taking action in said case not having been enlarged by this court, or any justice thereof (as appears from the record herein), as provided by section 939 of the act to establish a code of law for the District of Columbia, approved March 3, 1901.

2. Because of other errors, defects, and omissions appearing on the face of the record in this cause.

H. PRESCOTT GATLEY,
JOSEPH SHILLINGTON,
Attorneys for Defendant Edward Parker.

13 SUPREME COURT OF THE DISTRICT OF COLUMBIA,
Saturday, April 25, 1903.

The court resumes its session pursuant to adjournment, Mr. Justice Anderson, presiding.

* * * * * * *

UNITED STATES
vs.
GEORGE E. CADARR, EDWARD PARKER, John J. Keating, and John N. Myers.
No. 22917. Indicted for conspiracy.

Come as well the attorney of the United States as the defendants, defendant Edward Parker by his attorney H. P. Gatley, esq.; and thereupon defendant Edward Parker's motion to discharge the bail in this cause coming on to be heard and argued by counsel, it is ordered by the court that the said motion be and the same is hereby granted and that the said bail be and is hereby discharged for the reasons assigned in support of the said motion and under the provisions of section 939 of the act of Congress establishing a code for the District of Columbia, and that from the said indictment the said defendants and each of them go thereof without day; whereupon the U. S. attorney prays in open court an appeal to the court of appeals of the District of Columbia from the order of the court granting the said motion.

Supreme court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 15, inclusive, to be a true and correct transcript of the record, as per rule 5 of the court of appeals of the District of Columbia, in cause No. 22917, criminal, United States vs. George E. Cadarr et al., as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 27 day of May, A. D. 1903.

[Seal supreme court of the District of Columbia.]

JOHN R. YOUNG, *Clerk*

(Endorsed on cover:) District of Columbia supreme court. No. 1325. The United States, appellant, vs. George E. Cadarr et al. Court of appeals, District of Columbia. Filed May 28, 1903. Robert Willett, clerk.

14 THURSDAY, *April 7th, A. D. 1904.*

THE UNITED STATES, APPELLANT,
vs.
GEORGE E. CADARR, EDWARD PARKER, John J. Keating, and John N. Myers. } No. 1325.

THE UNITED STATES, APPELLANT,
vs.
LANCELOT A. HARTMAN. } No. 1326.

THE UNITED STATES OF AMERICA, appellant,
vs.
CHARLES A. HAYMAN. } No. 1353.

On motion, the appellee in No. 1326 is allowed until Tuesday next in which to file brief herein.

The argument in the above-entitled causes was commenced by Mr. C. A. Keigwin, attorney for the appellant, and was continued by Mr. R. R. Horner, attorney for the appellee in No. 1353, and by Mr. T. M. Fields, attorney for the appellee in No. 1326, and was concluded by Mr. C. A. Keigwin, attorney for the appellant.

15 THE UNITED STATES, APPELLANT,
vs.
GEORGE E. CADARR, EDWARD PARKER, John J. Keating, and John N. Myers. } No. 1325.

OPINION.

Mr. Justice Wright, of the supreme court of the District of Columbia, who sat with the court in the absence of Mr. Chief Justice Alvey, delivered the opinion of the court:

Upon April 25th, 1901, the appellees were arrested upon a charge of conspiracy to defraud, on warrant issued out of the police court of the District of Columbia. Upon the same day each pleaded "not guilty" and was held to bail to await the action of the grand jury. Parker and Keating were admitted to bail upon April 27, 1901, Cadarr and Myers on May 7th, 1901, they having been committed meanwhile. No further proceedings were had against any of them until March 31, 1902, on which day, more than eleven months after the holding over, the grand jury returned into the supreme court of the District of Columbia an indictment charging them jointly as in the original affidavit.

16 Upon April 4th, 1902, Cadarr, Keating, and Myers each pleaded "not guilty," as did Parker upon April 7th. On May 1st, 1902, Parker withdrew his plea of not guilty and *and* filed a motion to quash the indictment, basing his motion upon the provisions of section 939 of the District Code, which are as follows:

"Sec. 939. Abandonment of prosecution: If any person charged with a criminal offense shall have been committed or held to bail to await the action of the grand jury, and within nine months thereafter the grand

jury shall not have taken action on the case, either by ignoring the charge or by returning an indictment in the proper court, the prosecution of such charge shall be deemed to have been abandoned and the accused shall be set free or his bail discharged, as the case may be: Provided, however, that the supreme court of the District of Columbia, holding a special term as a criminal court, or, in vacation, any justice of said court, upon good cause shown in writing, and, when practicable, upon due notice to to the accused, may from time to time enlarge the time for the taking action in such case by the grand jury."

This motion was found by the court to be well taken, was sustained, and each of the defendants was discharged from the indictment without day. The case is here upon appeal from this order.

Although the plea of not guilty was technically withdrawn by only Parker, yet it is manifest from the general nature of the discharge that the situation below was such that the others were availing themselves of Parker's motion, although without the formal withdrawal of their pleas, and that the court below so regarded it.

It is suggested that appeal by the United States does not lie. Code, section 934, provides, "In all criminal prosecutions the United States * * * shall have the same right of appeal that is given to the defendant * * * *;" the right of appeal given to the defendant according to section 226 is from "any final order, judgment, or decree of the supreme court of the District of Columbia;" the order appealed from at bar discharged the appellees from the indictment without day, was therefore a final order and the appeal is properly here.

It is contended by Mr. United States Attorney that the section 939 does not apply to the case at bar for the reason, as he says, that the offense charged was committed prior to its enactment. The code was passed March 30, 1901, and came into effect January 1st, 1902. The appellees were arrested on April 25th, 1901, and the same day were held to await the action of the grand jury and gave bond. When the code became operative January 1, 1902, the charge was pending.

It is urged that "upon the familiar rule that statutes are construed to operate upon future matters and not retrospectively, section 939 can have no effect upon these prosecutions;" "these prosecutions" were not yet passed, but present and future, with respect to the time when the statute became operative; had been inaugurated before, pended at the time, and appear to be still continuing, at least according to the proceeding at bar; so that the propriety of applying the rule to which we are invited is not manifest to a degree of clearness which is calculated to make it attractive. That which is not yet come to its end is still of the present; and so with a prosecution which the code, when coming to be the operative law, found in existence; section 939 does not directly deal with substantive offenses, but only with criminal charges which are endeavored to be formulated upon them. If it be questioned, does section 939 reach back to a prior offense? It is answered, no; but section 939 takes hold upon current prosecutions of past offenses, prosecutions which coexist with it, and if its effect upon prosecution as distinguished from the offense is such that prosecutions are at length prohibited, judicial inquiry into the offense as such is likewise at an end. So that the question of retroactive operation of statutes is not here, and we are at no need for discussing it.

The question is this, does the code apply to proceedings which were pending when it took effect? Congress itself, through section 1638, speaks thus: "* * * Provided, That the provisions of this code relating to procedure or practice and not affecting the substantial rights of parties shall apply to pending suits or proceedings, civil or criminal."

What is the legal significance of the word "procedure?" "The law defines the rights which it will aid, and specifies the way in which it will aid them. So far as it defines, thereby creating, it is 'substantive law.' So for as it provides a method of aiding and protecting, it is 'adjective law,' or 'procedure.'" Holland Jur., p. 78.

"The word 'procedure' as a law term is not well understood. Fortunately, a distinguished writer on criminal law in America has adopted it as the title to a work—Bishop on Criminal Procedure. In his first chapter he undertakes to define what is meant by procedure. He says: 'Sec. 2. The term "procedure" is so broad in its signification that it is seldom employed in our books as a term of art. It includes in its meaning whatever is embraced by the three technical terms, pleading, evidence, and practice.' And in defining practice, in this sense, he says: 'The word means those legal rules which direct the course of proceeding to bring parties into the court and the course of the court after they are brought in.'" Kring v. Missouri, 107 U. S., 231–2.

The term procedure is said by Lush, L. J., to denote "the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding the court is to administer; the machinery as distinguished from the product." Poyser v. Minors, L. R., 7 Q. B. D., 329–333.

"Adjective criminal law, penal procedure, is the body of rules whereby the machinery of the courts is set in motion for the punishment of offenders. It consists usually of two species, a simpler, applicable * * * only to trifling transgressions, and a more solemn for the trial of serious crimes. Each of these consists of several stages, having a strong resemblance to the stages of procedure in private law. In the more solemn procedure we may distinguish—

I. The choice of the proper jurisdiction.

II. The choice of the proper court.

III. The procedure proper, consisting of—

17 1. The summons by which the accused is called upon, or the warrant under which he is compelled to appear to answer the charge.

2. The preliminary investigation, terminating in the discharge of the accused or in his being committed for trial.

3. The measures insuring that the accused shall be forthcoming for trial, viz, either imprisonment or security, given either by himself or his friends.

4. The pleadings by which on the one hand the prosecution informs the court and the accused of the nature of the charge against him, and, on the other hand, the accused states the nature of his defense, etc." Hol. Jur., pp., 334–335.

The section of the Code under consideration points out the next step appropriate to be taken in the cases of persons bailed or imprisoned without the formal pleading against them returned to the court during

nine months, and therefore relates to procedure. Neither does the section affect the "substantial rights" of the United States, for it does not affect its right to punish offenses, but only regulates the time in which the right shall be exercised. Substantial rights are those the violation of which gives rise to a remedy rather than the peculiar process through which the remedy is attained. So long as the right is not deprived of its remedy the substance of the matter is not affected by a change in the duration of stages and steps which in any event must be passed on the way to the remedy. Concerning these there are no vested rights.

"Alterations which do not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt, but—leaving untouched the nature of the crime and the amount or degree of proof essential to conviction—only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure." Hopt. v. Utah, 110 U. S., 574–590.

By differentiating questions of "procedure" from those of "substantial rights," Congress has by the very act pointed out that questions which turn out to be of procedure are thereby removed from the realm of substantial rights, at least for the purposes of the particular statute under consideration. The act applied to the prosecutions at bar; and as to its meaning the section concerns that step in the progress of a criminal prosecution which intervenes between the termination of proceedings in examining tribunals, and the inauguration of proceedings in the tribunal of final jurisdiction; the latter is accomplished by the return into court of an indictment found by the grand jury. The section has nothing to do with hastening trial after indictment, for its provisions relate only to absence of indictment; "and within nine months thereafter the grand jury shall not have taken action on the case, either by ignoring the charge or by returning an indictment into the proper court, the prosecution of such charge shall be deemed to have been abandoned and the accused shall be set free or his bail discharged, as the case may be. * * *"

The phraseology "shall be set free or his bail discharged" is susceptible of two meanings: Either, 1st, that he shall be set forever free from the substantive offense charged; or, 2d, that he shall be set free from only the specific charge of it then pending, and not free from the substance of the offense.

The first of the two constructions would altogether bar future indictment and trial; the second would sanction rearrest, indictment, and trial, even after a discharge had, on account of the expiration of nine months without action.

The question is, which of the two meanings expresses the intention of Congress?

If, in order to recognize that one which is the more agreeable to reason, it be needful to proceed further than merely to state the two, the qualifying language of the section supplies indicia in the presence of which we find our minds unable to perceive that there is room for any doubt of the matter; and we proceed to point out some of the reasons which appear to us.

First. It is not all cases of no indictment within nine months which the statute reaches, but only those charges which are neither ignored within nine months nor returned indicted within nine months; with these only does the statute deal, leaving those ignored within nine months and those indicted within nine months still in the operation of the common law and unaffected by the statute; the statute embraces only those whereon "the grand jury shall not have taken action" one way or the other.

This is a differentiation between all cases, and some cases, with the statute applying only to some; and whatever construction be assigned the statute, its meaning can have no relation to charges ignored within nine months, and no relation to charges indicted within nine months, for these are exempted from the operation of the statute.

According to the common law, cases ignored and cases indicted are both subject to new inquisition and further indictment by grand jury, and such is the situation in which are left the cases exempted from the operation of the statute at bar.

Now it occurs to us that if the second meaning be assigned the statute—we mean that construction which permits future indictment after nine months of the cases operated upon by the statute, as well as those not operated upon—we shall behold upon the part of Congress a painstaking discrimination of all criminal charges into two classes, one wherein action is had within nine months; the other, no action within nine months; one class exempted from the operation of the statute and left so that indictment may be had after nine months, according to the common law; the other class within the operation of the statute, and yet with but the same result that in this class, too, indictment may be had after nine months; a division into classes for the purpose of legislation; an exemption of one class from the legislation; legislation for the other class, and yet the law turns out the same for both. The law for the class legislated upon remains the same as the law for the class not legislated upon,
legislation had, but the law upon the point of the legislation
18 remains the same as it was before legislation, but no change in
the law.

Second. It is provided in the section that the criminal term of the supreme court of the District, or in vacation of any of its justices, "upon good cause shown in writing, may from time to time enlarge the time for taking action in such case by the grand jury."

If the second meaning be attached to the statute, to wit, that the discharge is only from the pending prosecution, this proviso turns out not only unnecessary but idle and useless; for if the discharge is only from the pending accusation, this leaves the grand jury already free to indict at a later period, because, according to the construction, it has never been deprived of that power. There is neither need nor reason for vesting in the court power to extend the time for action if action may be had independent of any extension; the fact that power to extend the time for action is conferred, and is to be granted only "upon good cause shown in writing," shows the legislative mind to have understood that unless there was extension, the time for action has finally expired with the nine months.

Third. As suggested, supra, the second construction would sanction the rearrest and recommitment for a second period of nine months, upon

a second charge of the same offense, immediately upon being once set free after the first nine months; not only for a second nine months after the first nine months, but a third after a second, and so ad infinitum. Now, if this be the case, the entire statute accomplished no more than to require the vain ceremony of a discharge from incarceration to-day, and a recommitment upon a duplicate affidavit and warrant to-morrow; a discharge of bail on one day, and a reacceptance of the same surety upon a duplicate bond the next day. Now, it is not in reason to say that legislatures concern themselves with mere idle projects; on the other hand, when an act is susceptible of two constructions, of which the one will accomplish a very reasonable enforcement of a constitutional right of the citizen, and of which the other will accomplish only an idle repetition of a useless ceremony which leaves the right inoperative, and when the subject of the legislation is within the orbit of the constitutional right, it ought to need but scant argument to identify which of the two constructions effects the legislative intent. The statute was enacted in the light and under the operation of the sixth amendment of the Federal Constitution, and if the two are read together, as they must be, the Constitution providing that "In all criminal prosecutions the accused shall enjoy the right to a speedy" trial, and the statute providing that an accused who for nine months is held in custody or under bail with no step taken in the prosecution shall be discharged, it seems right clear that the act was intended in aid of the operation of the Constitution, and to make effective its guarantee.

If such was the purpose of Congress, and we find ourselves of that opinion, the purpose can be made effective only by according to the discharge an effect which relieves the accused from further accountability for the substance of the offense, and not only from the pending prosecution, for, if he be discharged only from the pending prosecution during one moment and left subject to the inauguration of a second prosecution at the next, and a third after a discharge from the second, the statute is eviscerated of the purpose which predicates its enactment. It was argued that this construction would accomplish a general jail delivery of the guilty. But shall courts assume to pronounce men guilty before they are tried or even indicted? The law operates for the innocent and for the guilty alike, until the identity of the guilty is ascertained by due process of law; neither the innocent nor the guilty ought to be indefinitely restrained in custody or under bail, and the constitutional rights of even the guilty are to be respected; indeed, if surmise is to be indulged in, it is not destructive of penal procedure to hazard the assumption that the one against whom, in nine months, no evidence sufficient to base an indictment is submitted, is as likely to be innocent as guilty.

If the legislative purpose was not that the discharge should be final, but merely current, the only alternative purpose fit to be ascribed to Congress was a purpose to accommodate freedom from incarceration for those continuing nine months in custody; but the possibility of the existence of this as the purpose is eliminated by considering that the act applies as well to those who never were in custody but only bailed. If this latter purpose underlay the enactment, even it is destroyed by the construction suggested by the United States attorney, for not even freedom from incarceration would be accommodated by returning an accused into jail as often as he was turned out.

So that the discharge contemplated must be final, or the statute conceded no effect at all.

It is said that the construction which we find appropriate would accomplish a repeal of the general statute of limitations, R. S., sec. 1044, which provides that no person shall be prosecuted unless the indictment is found within three years next after the commission of the offense; the general statute operates with respect to the time of the offense, independent of the time of holding the accused to await the action of the grand jury; the section at bar operates with respect to the time of holding the accused to await action of the grand jury, and independent of the time of the offense. Their respective provisions are harmonious, and might without conflict be incorporated together into a single section, as in effect they must be when read together; the effect of the two is to declare that "no person shall be prosecuted unless the indictment is found within three years next after the offense shall have been committed, and all persons who, after the inauguration of prosecution, are for nine months held in custody or under bail to await action of the grand jury, without action by the grand jury, shall be finally discharged." It has not been conceived that the statute which requires the perfecting within six days of civil appeals from justices of the peace repealed the general statute of limitations upon the subject of civil actions, and the analogy seems accurate.

It is contended that even though the section be held to apply to pending cases, yet nine months must be reckoned from January 1st, 1902, when the Code took effect, and not from the
19 time of commitment or bail in particular cases, but this would in effect maintain that the act did not apply to pending prosecutions, for in order to apply it to a prosecution it must be given effect in that prosecution by working a discharge in that very case, after the expiration of nine months from the time of commitment or bail; if it be not given this effect it has not been applied. The only limitation to be put upon its operation upon pending cases grows out of the established rule that statutes in the nature of limitations which affect existing rights should afford a reasonable time for the commencement of an action before the bar takes effect. Terry v. Anderson, 95 U. S. 628; Koshkonong v. Burton, 104 U. S. 668.

At bar the requirements of the rule were fully satisfied, for by the passage of the Code, March 30th, 1901, the Government was put upon notice of a change in the law to become effective January 1st, 1902; the appellees having been arrested upon April 25, 1901, the opportunity to indict them which the new legislation afforded continued through eight months in 1901 and one month of 1902; appellee was not indicted until March 31st, 1902, longer than eleven months after being held to bail, and more than a full year after the Government had been put upon notice of the nine months' limitation. The question is not so much whether the time intervening between the taking effect of the law and the operation of the bar afforded reasonable opportunity, as it is whether the time intervening between the enactment of the law and the operation of the bar affords reasonable opportunity. The fact that the law was enacted to take effect a considerable time in future is evidence enough that Congress ordained the period in order to afford the opportunity, and esteemed that the opportunity afforded was reasonable. When it is provided that an

act shall take effect at a date appreciably later than its passage, the question of reasonable time is to be determined by reckoning from the date of passage, not from the date at which the act takes effect. Duncan v. Cobb, 32 Minn. 460; State v. Jones, 21 Md. 432; Wrightman v. Boone County, 82 F. 412; Hedger v. Rennaker, 3 Met. (Ky.) 255; Ross v. Duval, 13 Pet. 45.

It is contended that in order to make available whatever right the section gave, an accused can avail himself of it only by moving his discharge prior to the return of an indictment; that if, in fact, an indictment be returned after nine months and no application for discharge meanwhile, that he is too late, after the indictment.

If by the lapse of time a right accrued in a defendant, who but himself can nullify the right? There is no way at all, unless through his voluntary waiver of it or through an estoppel; and there is here no field for estoppel, for the Government was uninfluenced by his quiescence. So that his right was there unless he had waived it; if he had, it was gone. Being without access to the deliberations of the grand jury or its proceedings, he was chargeable with no notice that they had during nine months taken no action upon his case, and there can be no waiver of a point concerning which he is not only ignorant in fact, but concerning which he is free from the implication of knowledge, either actual or constructive. He was bailed, and was as well justified to believe that the charge had been ignored as that it had been suffered to slumber; indeed more, for he had a right to expect that the requirements of the law would be respected, both concerning action on his case within nine months, as as well as concerning a showing of good cause in writing and an enlargement of time by the court, if it was expected to act on his case after nine months.

His right needed no action on his part for its existence. Neither was there any necessity for its affirmative enforcement until some interference with it developed. None ever did develop until the indictment was filed. If his plea of not guilty was with the intention to waive his right of discharge and stand his trial, the court below might, with propriety, have held him to it and put him upon his trial. If his plea was inadvertent, and not with the intent to waive the right to a discharge, the court might, with propriety, have permitted the withdrawal of the plea and remitted him to his original right. The withdrawal of the plea of not guilty was for the discretion of the trial court, and the exercise of this discretion to the end of permitting the withdrawal and thereby the elimination of the plea concludes the question of a waiver through making the plea, for with the plea gone out of consideration it amounts to nothing. The judgment of the court below was right and is affirmed.

20 THURSDAY, *June 30th, A. D. 1904.*

THE UNITED STATES, APPELLANT,
vs.
GEORGE E. CADARR, EDWARD PARKER, John J. Keating, and John N. Myers. } No. 1325. April term, 1904.

Appeal from the supreme court of the District of Columbia. This cause came on to be heard on the transcript of the record from the

supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, affirmed.

Per Mr. JUSTICE WRIGHT.

JUNE 30, 1904.

21 Court of appeals of the District of Columbia.

I, Henry W. Hodges, clerk of the court of appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 20, inclusive, contain a true copy of the transcript of record and proceedings of said court of appeals in the case of the United States, appellant, vs. George E. Cadarr, Edward Parker, John J. Keating, and John N. Myers. No. 1325. April term, 1904, as the same remain upon the files and records of said court of appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said court of appeals, at the city of Washington, this 8th day of November, A. D. 1904.

[SEAL.] HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

22 UNITED STATES OF AMERICA, ss.

The President of the United States of America to the honorable the judges of the court of appeals of the District of Columbia, greeting:

Being informed that there is now pending before you a suit in which the United States is appellant and George E. Cadarr, Edward Parker, John J. Keating, and John N. Myers are appellees, which suit was removed into the said court of appeals by virtue of an appeal from the supreme court of the District of Columbia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said court of appeals and removed into

23 the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the seventh day of December, in the year of our Lord one thousand nine hundred and four.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

24 (Indorsed:) File No. 19538. Supreme Court of the United States. No. 438, October term, 1904. The United States *vs.* George E. Cadarr et al. Writ of certiorari.

25 Supreme Court of the United States.

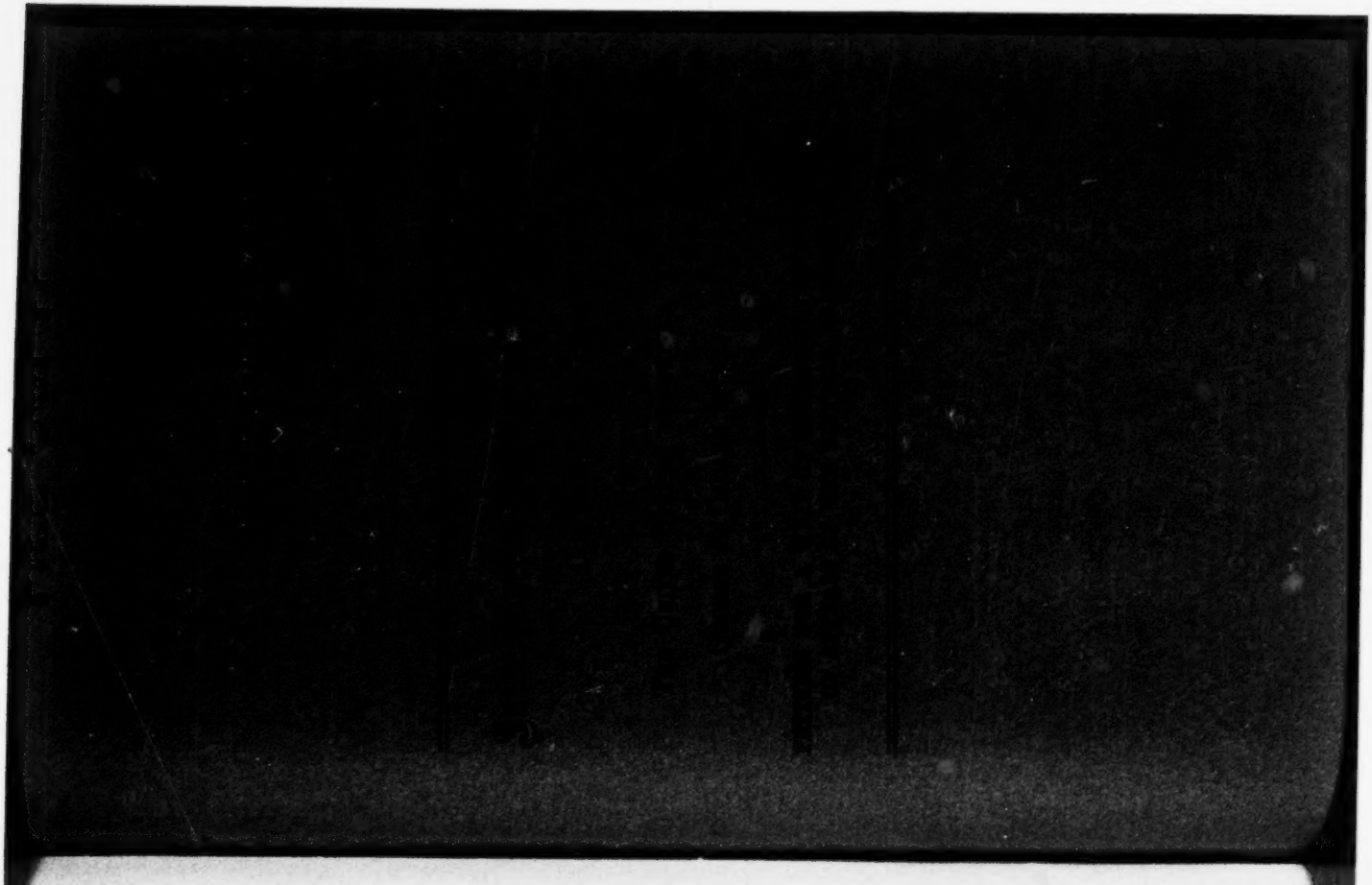
THE UNITED STATES, PETITIONER,
vs.
GEORGE E. CADARR ET AL.
} No. 438, October term, 1904.

On consideration of the motion that the transcript of record filed as an exhibit to the petition for a writ of certiorari herein be taken as a return to said writ,

It is now here ordered by the court that said motion be, and the same is hereby, granted.

JANUARY 30, 1905.

26 (Indorsed:) File No. 19530. Supreme Court of the United States. October term, 1904. Term No. 430. Order. Filed Jan. 30, 1905.



In the Supreme Court of the United States

OCTOBER TERM, 1904.

THE UNITED STATES, PETITIONER,
v.
GEORGE E. CADARR ET AL. } No. ——.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

The Solicitor-General, on behalf of the United States, respectfully prays for a writ of certiorari to review the judgment of the Court of Appeals of the District of Columbia in the above-entitled case.

STATEMENT.

The Code of Law for the District of Columbia enacted by Congress March 3, 1901, and which took effect January 1, 1902 (31 Stat., 1189, 1341), provides

> SEC. 939. ABANDONMENT OF PROSECUTION. If any person charged with a criminal offense shall have been committed or held to bail to await the action of the grand jury, and within nine months thereafter the grand jury shall not have taken action on the case, either by ignoring the charge or by returning an indictment into the proper court, the prosecution of such

charge shall be deemed to have been abandoned, and the accused shall be set free or his bail discharged, as the case may be: *Provided, however*, That the supreme court of the District of Columbia, holding a special term as a criminal court, or, in vacation, any justice of said court, upon good cause shown in writing, and, when practicable, upon due notice to the accused, may from time to time enlarge the time for the taking action in such case of the grand jury.

On April 25, 1901, Cadarr and the other respondents, three in number, were arrested upon a charge of conspiracy to defraud, laid on the 22d of that month, and held to await the action of the grand jury. Thereafter, between April 27 and May 7, 1901, they were released on bail. On March 31, 1902, the grand jury returned an indictment against them for the offense stated. At the trial of the case in the Supreme Court of the District of Columbia all the defendants pleaded not guilty, but afterwards one of them, Parker, obtained leave to withdraw his plea and filed a motion to quash the indictment, on the ground that it was not found within nine months after his holding to bail. Parker's motion to quash was sustained and his bail discharged, and it was further ordered that all the defendants go without day.

Upon appeal by the United States, the Court of Appeals sustained the action of the lower court.

It is to be observed that the appeal of the Govern-

ment was authorized by section 935 of the District Code (31 Stat., 1341), which provides:

> SEC. 935. APPEALS BY UNITED STATES AND DISTRICT OF COLUMBIA. In all criminal prosecutions the United States or the District of Columbia, as the case may be, shall have the same right of appeal that is given to the defendant, including the right to a bill of exceptions: *Provided*, That if on such appeal it shall be found that there was error in the rulings of the court during the trial, a verdict in favor of the defendant shall not be set aside.

In view of this provision, the propriety of issuing a writ of certiorari to the Court of Appeals in this case can not be questioned on account of its criminal nature. An appeal by the Government in a criminal case now stands upon the same footing as all other appeals in the Court of Appeals, except that when there has been a verdict of the jury in favor of the defendant it can not be set aside for errors in the rulings of the trial court. The Court of Appeals so ruled in this case. The case may therefore be properly brought here under the following section of the Code:

> SEC. 234. In any case heretofore made final in the Court of Appeals it shall be competent for the Supreme Court of the United States to require, by certiorari or otherwise, any such case to be certified to said Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to said Supreme Court.

The Court of Appeals held—

1. That section 939 applied to proceedings pending when the Code went into effect.

2. That the discharge of an accused under the provisions of that section relieves him from further accountability for the offense, and not merely from the pending prosecution. In other words, that the non-action of the grand jury within nine months after his arrest or commitment to bail operates as an acquittal and bars further prosecution.

Several important prosecutions pending at the time the Code took effect will be affected by the first ruling. But the materiality of the first ruling depends upon the correctness of the second, since if the discharge of the accused under section 939 be not, as the Court of Appeals held, from the offense and final, but only from imprisonment or bail, they may still be indicted and tried, the period of limitation in this and the other cases referred to not having elapsed. Hence it is upon the gravity and manifest error of the second ruling, which will apply as well to all future cases, that the Government relies to obtain the writ prayed.

It is obvious that the latter ruling will seriously imperil the administration of criminal justice in this District. It means that the period of limitation in respect of crimes has been changed by the Code from three years, as provided by section 1044 of the Revised Statutes of the United States (which section is continued in force by section 1 of the Code), to nine

months, whenever the accused shall have been committed or held to bail; and this, although there is no suggestion whatever in section 939 that it was intended as a new statute of limitations.

ARGUMENT.

The plain import of section 939 is that it was intended merely to limit the time that any person charged with a criminal offense might be committed or held to bail pending the action of the grand jury. The statute does not say that if the grand jury fail to take action within nine months after the accused is committed or held to bail he shall be discharged of the *offense*, but that he "shall be *set free* or his bail discharged."

The Court of Appeals argues that unless the statute be construed to mean that the accused shall be finally discharged of the offense, the legislation of Congress is void of effect. Thus, it says:

> According to the common law, cases ignored and cases indicted are both subject to new inquisition and further indictment by grand jury, and such is the situation in which are left the cases exempted from the operation of the statute at bar.
>
> Now it occurs to us that if the second meaning be assigned the statute—we mean that construction which permits future indictment after nine months of the cases operated upon by the statute, as well as those not operated upon—we shall behold upon the part of Congress a painstaking discrimination of all criminal charges

> into two classes, one wherein action is had within nine months; the other, no action within nine months; one class exempted from the operation of the statute and left so that indictment may be had after nine months, according to the common law; the other class within the operation of the statute, and yet with but the same result that in this class, too, indictment may be had after nine months; a division into classes for the purpose of legislation; an exemption of one class from the legislation; legislation for the other class, and yet the law turns out the same for both. The law for the class legislated upon remains the same as the law for the class not legislated upon, legislation had, but the law upon the point of the legislation remains the same as it was before legislation, but no change in the law.

The fallacy of this reasoning lies in the fact that the court assumed it was the intention of Congress by the statute in question to limit the time in which an indictment might be found—the very point in issue—whereas the manifest intention was simply to limit the time the accused might be committed or held to bail pending the action of the grand jury. The statute says he shall not be so committed or held for a longer period than nine months. This was a vital change in the existing law, which made no limitation upon the time an accused might be committed or held to bail pending the action of the grand jury, and relieves the construction contended for by the Government of the charge of futility.

In support of the proposition that the discharge contemplated by the statute was from the offense and final, the Court of Appeals further said:

> It is provided in the section that the criminal term of the Supreme Court of the District, or in vacation of any of its justices, "upon good cause shown in writing, may from time to time enlarge the time for taking action in such case by the grand jury."
>
> If the second meaning be attached to the statute, to wit, that the discharge is only from the pending prosecution, this proviso turns out not only unnecessary, but idle and useless; for if the discharge is only from the pending accusation this leaves the grand jury already free to indict at a later period, because, according to the construction it has never been deprived of that power. There is neither need nor reason for vesting in the court power to extend the time for action if action may be had independent of any extention; the fact that power to extend the time for action is conferred, and is to be granted only "upon good cause shown in writing," shows the legislative mind to have understood that unless there was extension, the time for action has finally expired with the nine months.

Here again the court proceeds upon the assumption that Congress intended to limit the time in which an indictment be found, instead of the time the accused might be committed or held to bail pending the finding of an indictment. The manifest purpose of the proviso to section 939 is to afford the Government an opportunity to enlarge the time the accused might be

committed or held to bail pending the action of the grand jury, not the time in which it might procure an indictment. If the grand jury fail to take action within nine months, and the time for taking such action be not enlarged as prescribed, *then the accused is to be set free* or his bail discharged—and that is as far as the statute pretends to go. It is absolutely silent as to the finding of an indictment after such release or discharge.

The Court of Appeals further suggests that if the discharge of the accused under section 939 be not from the offense and final, nothing will be accomplished thereby, as he may be immediately rearrested. This by no means follows, and even if it did, that fact would not be conclusive. It may be said that, since the statute plainly intends that a person shall not be committed or held to bail, pending the action of the grand jury, for a longer period than nine months, unless the time shall be enlarged as stated, if discharged under that section after the statutory period has elapsed he could not be rearrested unless the grand jury had, in the meantime, taken action by finding an indictment against him. But the purpose of the statute is simply to prevent undue encroachment upon the liberty of the citizen when charged with crime, not to free him from all accountability therefor.

THE AUTHORITIES—FURTHER PROSECUTION.

It will be observed that the Court of Appeals cites no authorities whatever in support of its view that the discharge of a person committed or held to bail under section 939 is from the offense and final. Statutes similar

to section 939 exist in many of the States. Some of them provide, in express terms, that by reason of a failure to prosecute within a specified time, the accused shall be discharged of the offense. Thus the Georgia statute provides that he "*shall be absolutely discharged* and acquitted of the offense charged in the indictment;" the statutes of other States that "he shall be discharged so far as relates to the offense for which he was committed." Such expressions have very properly been held to amount to an acquittal and bar further prosecution.

Jackson v. *State*, 76 Ga., 551, 565.
Stewart v. *State*, 13 Ark., 720, 730.
Johnson v. *State*, 42 Ohio St., 209.
State v. *Wear*, 145 Mo., 162.

But in no case—except an Indiana decision (*McGuire* v. *Wallace*, 109 Ind., 284, 289), where the court followed the Ohio cases without adverting to the material difference in the language of the Ohio statute—has it been held that a simple direction that the accused "shall be discharged" operates as an acquittal and bars further prosecution.

In the Missouri case above cited the court calls attention to the marked difference between the New Jersey statute, which merely provides that the defendant "shall be discharged," and the Missouri statute, which provides that he shall be "entitled to be discharged *so far as relates to such offense*," observing that the New Jersey statute "intends only a simple discharge without any finality to it."

State v. *Wear*, 145 Mo., 189.

A like observation, in reference to the decisions under the Illinois and Colorado statutes, was made in—

In re Edwards, 35 Kans., 103.

In New Jersey it is settled that its statute, referred to in *State* v. *Wear*, *supra*, merely imports release from imprisonment and not immunity from further proceedings.

State v. *Garthwaite*, 23 N. J. L., 143.
Apgar v. *Woolston*, 43 N. J. L., 57, 66.

Such is also the rule of decision in other States having similar statutes.

Waller v. *Com'th.*, 84 Va., 492, 494.
Byrd v. *State*, 1 How. (Miss.), 163, 171.
In re Bergerow, 133 Cal., 349; 136 id., 293.
State v. *Fley*, 2 Brevard, 338; approved in *State* v. *Williams*, 35 S. C., 163.

It is to be observed that the language of the District Code is not that the accused "shall be discharged," but merely that he "shall be SET AT LIBERTY *or his bail discharged, as the case may be." There is even less ground for holding that this language was intended to operate as a discharge of the offense.*

In Colorado the statutory provision is precisely the same as section 939—that the accused "shall be set at liberty." This has been held to operate merely to set the prisoner at liberty, and not to work a discharge of the offense, the court noting a distinction between such language and that used in the statutes which are held to make discharge equivalent to an acquittal.

In re Garvey, 7 Col., 509.

SUBSEQUENT ARREST.

As already stated, it may be said that a person set free or whose bail was discharged under section 939 can not be rearrested and committed or held to bail for the same offense until an indictment had been found against him. But, even if it were otherwise, that fact would not justify a different construction from that contended for by the Government. It has never been held that the discharge of a person from one confinement, which was originally or had become illegal, precludes a second or a third arrest for the same cause.

Taking the rule upon *habeas corpus* as an illustration, we find that one discharged from imprisonment thereunder may be immediately rearrested for the same offense upon new process issued by a court of competent jurisdiction. Thus section 6 of the *habeas corpus* act of 31 Charles II provides:

> That no person or persons which shall be delivered or set at large upon any *habeas corpus* shall at any time hereafter be again imprisoned or committed for the same offense by any person or persons whatsoever, other than by the legal order and process of such court wherein he or they shall be bound by recognizance to appear, or other court having jurisdiction of the cause.
>
> *Attorney-General* v. *Kwok-a-Sing*, L. R., 5 P. C., 179, 201–2.

In *Ex parte Milburn* (9 Pet., 709) Mr. Justice Story said:

> A discharge of a party, under a writ of *habeas corpus*, from the process under which he is im-

prisoned, discharges him from any further confinement under that process; but not under any other process which may be issued against him under the same indictment.

One held under an illegal sentence is entitled to be released on *habeas corpus*, but he may be at once retaken and held for a new sentence.

In re Bonner, 151 U. S., 242.

Nor does a discharge on *habeas corpus* preclude an investigation by the grand jury; release from imprisonment does not wipe out the offense.

2 Spelling, Extraordinary Relief, sec. 1227.

ABANDONMENT OF PROSECUTION.

The fact that section 939 says that "the prosecution of the *charge* shall be deemed to have been abandoned," furnishes no argument in support of the contention that a discharge under that section bars further prosecution of the *offense*. It has never been held that the mere abandonment of a prosecution by the State bars further prosecution of the offense. Even a formal *nolle prosequi* leaves the accused liable to fresh indictment and to all the consequences of his offense as if there had been no abortive prosecution.

1 Chitty Crim. Law, 480.
1 Bishop Crim. Proc. (3d ed.), sec. 1395.
Goddard v. *Smith*, 6 Modern, 262.
Dealy v. *United States*, 152 U. S., 542.

The statute merely makes the presumptive abandonment of the particular charge upon which the party

was arrested, by reason of the non-action of the grand jury within the prescribed time, the ground for his being set free or his bail discharged. The particular charge having been abandoned, or presumptively abandoned, there is no longer any reason or justification for his being committed or held to bail. But that is very far from saying there is no longer any reason for his being prosecuted for the offense that he may have committed and that such release or discharge operates as an acquittal.

ABANDONMENT CAN NOT BE PLEADED AFTER INDICTMENT

The Government also contends that after an indictment has been found it is too late for the accused to plead an abandonment of the prosecution under section 939. The purpose of the statute being merely to prevent his being committed or held to bail pending the action of the grand jury for an undue length of time, and not to defeat indictment, but rather to promote it, his failure to take advantage of the statute and obtain his release before an indictment is found leaves him without any further right in the premises. He has nothing to complain of, since his right to be released has been lost through his own laches.

It is respectfully submitted that in view of the gravity of the case and the manifest error committed by the Court of Appeals, the writ prayed should issue.

HENRY M. HOYT,
Solicitor-General.

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In the Supreme Court of the United States

OCTOBER TERM, 1904.

THE UNITED STATES, PETITIONER,
v.
GEORGE E. CADARE, EDWARD PARKER, JOHN J. KEATING, and JOHN N. MYERS, respondents. } No. 436.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THE UNITED STATES, PETITIONER,
v.
GEORGE E. CADARR, EDWARD PARKER, JOHN J. KEATING, and JOHN N. MYERS, respondents. } No. 438.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case involves the construction and application of the following section of the District code (31 Stat., 1189, 1342):

> SEC. 939. ABANDONMENT OF PROSECUTION. If any person charged with a criminal offense shall have been committed or held to bail to await the action of the grand jury, and within nine months thereafter the grand jury shall not have taken action on the case, either by ignoring the charge or by returning an indictment into the proper court, the prosecution of such charge shall be deemed to have been abandoned, and

> the accused shall be set free or his bail discharged, as the case may be: *Provided, however,* That the supreme court of the District of Columbia, holding a special term as a criminal court, or, in vacation, any justice of said court, upon good cause shown in writing, and when practicable, upon due notice to the accused, may from time to time enlarge the time for the taking action in such case by the grand jury.

The code was established by act of Congress approved March 3, 1901, which expressly provided (sec. 1) that it should "go into effect and operation from and after the first day of January, in the year of our Lord nineteen hundred and two."

The following "repeal provisions" of the code bear upon the construction of section 939 (31 Stat., 1435–1436):

> SEC. 1638. The repeal by the preceding section of any statute, in whole or in part, shall not affect any act done or any right accruing or accrued or any suit or proceeding had or commenced in any civil cause before such repeal, but all rights and liabilities under the statutes, or parts thereof so repealed shall continue and may be enforced in the same manner as if such repeal had not been made: *Provided,* That the provisions of this code relating to procedure or practice and not affecting the substantial rights of parties shall apply to pending suits or proceedings, civil or criminal.
>
> SEC. 1641. All offenses committed and all penalties or forfeitures incurred in the District prior to the date on which this code is to take effect

> may be prosecuted and punished in the same manner and with the same effect as if this code had not been enacted.

Respondents were arrested April 25, 1901, upon a warrant charging them with conspiracy to defraud, laid on April 22. (R., 1.)

They were arraigned in the police court on the same day, pleaded not guilty, and were held to await action by the grand jury. (R., 2.)

Parker and Keating were admitted to bail April 27 (R., 2–6), Cadarr and Myers May 7, 1901. (R., 7.)

On March 31, 1902—eleven months after the arrest and three after the code became operative—the grand jury returned an indictment for conspiracy. (R., 8.)

April 4, 1902, Cadarr, Keating, and Myers were arraigned in the Supreme Court of the District and pleaded not guilty. April 7 Parker was arraigned and entered the same plea. (R., 11.)

May 1, 1902, Parker withdrew his plea and filed a motion to quash—

> Because the said indictment was not returned into court within nine months after the 25th day of April, A. D. 1901, on which said day this defendant was held to bail to await the action of the grand jury on said charge of conspiracy; the time for taking action in said case not having been enlarged by this court, or any justice thereof (as appears from the record herein), as provided by section 939 of the act to establish a code of law for the District of Columbia, approved March 3, 1901.

The court sustained the motion, directed that Parker's bail be discharged, and that from the indictment all the defendants go without day. (R., 13.) The Court of Appeals sustained this order.

The case is here upon writ of certiorari granted December 5, 1904.

ASSIGNMENT OF ERRORS.

1. If a release or discharge under section 939 operates as an acquittal and bars further prosecution, the Court of Appeals erred in holding that section applied to arrests made before the code took effect.

2. The Court of Appeals erred in holding that the period of nine months in which the grand jury is required to act began to run from the time of arrest and not from the time when the code took effect.

3. The Court of Appeals erred in holding that failure of the grand jury to act within the prescribed time operates as an acquittal and bars further prosecution.

ARGUMENT.

I.

Application of the statute to arrests made before the code took effect.

Section 1638 of the code provides:

> That the provisions of this code relating to *procedure* or practice *and not affecting the substantial rights of parties* shall apply to pending suits or proceedings, civil or *criminal*.

Section 939 is a provision relating to procedure, and appears in chapter 20, entitled "Criminal Procedure" (31 Stat., 1337).

If section 939 be construed and applied as it was by the courts below, it is clearly a provision as to procedure "affecting the substantial rights of parties," within the meaning of section 1638, and therefore does not apply to arrests made prior to January 1, 1902. Those courts have decided that in less than one month after that date—nine months from the arrest terminated January 24, 1902—appellees were entitled to have their bail discharged and the prosecution against them was absolutely barred.

To hold that section 939, so construed, applied to arrests made before the code took effect would nullify section 1641, which provides:

> All offenses committed and all penalties or forfeitures incurred prior to the date on which this code is to take effect may be prosecuted and punished in the same manner and with the same effect as if this code had not been enacted.

II.

When statutory period began to run upon arrests made before the code took effect.

If section 939 applies to arrests made before the code became effective, the nine months' period in which the grand jury is required to act began to run from the date it took effect.

The courts below have given the statute a retrospective effect. The arrests were made eight months be-

fore the code became operative, and it has been held that one month thereafter respondents were entitled to have their bail discharged and the prosecution against them was barred. By the same logic, if the arrests had been made more than nine months, the Government would have had no opportunity whatever to prosecute respondents after the code became effective. In other words, section 939 would have operated as a statute of amnesty and oblivion.

The statute, in any view, should, under well-settled principles, be given a prospective and not a retrospective effect.

The rule is thus stated by Mr. Justice Harlan in *Chew Heong* v. *United States* (112 U. S., 536, 559):

> In *United States* v. *Heth* (3 Cranch, 398, 413) this court said that "words in a statute ought not to have a retrospective operation unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature can not be otherwise satisfied;" and such is the settled doctrine of this court. (*Murray* v. *Gibson*, 15 How., 421, 423; *McEwen* v. *Den.*, 24 How., 242, 244; *Harvey* v. *Tyler*, 2 Wall., 328, 347; *Sohn* v. *Waterson*, 17 Wall., 596, 599; *Twenty Per Cent Cases*, 20 Wall., 179, 187.)

The act establishing the code, so far from requiring that any of its sections should have a retrospective effect, expressly provides that it is "to go into effect and operation *from and after* the first day of January, in the year of our Lord nineteen hundred and two."

Section 1641 provides that all offenses committed prior to the taking effect of the code may be prosecuted and punished in the same manner and with the same effect as if it had not been enacted.

The applicable rule is stated in *Sohn* v. *Waterson* (17 Wall., 596), where it was held that, as applied to causes of action theretofore accrued, a statute of limitations begins to run, in the absence of contrary provision, from the date of its passage.

Statutes reducing the period of limitation are constitutional when they allow reasonable time in which to bring suit.

Terry v. *Anderson*, 95 U. S., 633.
Koshkoning v. *Burton*, 104 U. S., 675.
McGahey v. *Virginia*, 135 U. S., 705.

But when a statute changes or shortens the period of limitation, one whose cause of action accrued prior to its passage has the full time given by it in which to sue. In other words, the period of limitation begins to run from the date of the new act and not from the time when the cause of action first accrued.

Sohn v. *Waterson*, 17 Wall., 596.
Rodebaugh v. *Phila. Traction Co.*, 190 Pa. St., 358.
Bowden v. *Railroad Co.*, 196 Pa. St., 562.
Warshung v. *Hunt*, 18 Vroom (N. J.), 256.
Huber v. *Zimmerman*, 8 Okla., 573, and other Oklahoma cases cited, all based on *Sohn* v. *Waterson*, *supra*.
Tacoma Bldg. Assn. v. *Clark*, 8 Wash., 289.
State v. *Jones*, 21 Md., 432.

Stephen v. *Lewis*, 62 Md., 229.
Garrison v. *Hill*, 81 Md., 551.
Manning v. *Carruthers*, 83 Md., 1.

Section 939 introduced a new provision into the criminal law of the District, and as the act establishing the code provides that it is to operate prospectively, no exception in respect of that section seems permissible.

The fact that the act was approved several months prior to the date when the code took effect did not cause section 939 or other sections to operate retrospectively. Ordinarily, a statute speaks from the time it goes into effect, not from its passage. Congress took especial care to provide that the code should not operate retrospectively, but should go into operation "from and after" January 1, 1902. Section 1638 emphasizes this, for it provides that suits and proceedings pending when the code took effect should not be affected, *even at that date*, by provisions relating to procedure and practice which affected substantial rights. So, too, section 1641 was intended to prevent the establishment of the code from interfering with the prosecution and punishment of offenses theretofore committed.

The purpose of Congress in making the code effective at a future date was to give ample notice of changes. Such notice was not complete until the lapse of the entire period contemplated.

This accords with the views expressed by Judge Cooley, in *Price* v. *Hopkin* (13 Mich., 318), wherein the court held:

> A statute passed to take effect at a future day is to be understood as speaking from the time it goes into operation, and not from the time of its passage. The intervening period is allowed to enable the public to become acquainted with its provisions; but until it becomes operative as a law, they are not compelled to govern their actions by it.

Judge Cooley's views were adopted by the court of appeals of New York in *Gilbert* v. *Ackerman* (159 N. Y., 118, 123) construing a statute of limitations passed several months before it took effect.

III.

Failure of grand jury to act within prescribed time does not operate as an acquittal and bar further prosecution.

The object of section 939 was to limit the time one charged with crime might be *committed or held to bail pending action by the grand jury.* It does not say if the grand jury fail to act within the prescribed time the accused shall be discharged of the *offense*, but that he "shall be *set free* or *his bail discharged.*"

The Court of Appeals argue that unless the section be construed to give the accused final discharge from the offense it is without effect. They say:

> According to the common law, cases ignored and cases indicted are both subject to new inquisition and further indictment by grand jury, and such is the situation in which are left the cases exempted from the operation of the statute at bar.

> Now it occurs to us that if the second meaning be assigned the statute—we mean that construction which permits future indictment after nine months of the cases operated upon by the statute, as well as those not operated upon—we shall behold upon the part of Congress a painstaking discrimination of all criminal charges into two classes, one wherein action is had within nine months; the other, no action within nine months; one class exempted from the operation of the statute and left so that indictment may be had after nine months, according to the common law; the other class within the operation of the statute, and yet with but the same result that in this class, too, indictment may be had after nine months; a division into classes for the purpose of legislation; an exemption of one class from the legislation; legislation for the other class, and yet the law turns out the same for both. The law for the class legislated upon remains the same as the law for the class not legislated upon, legislation had, but the law upon the point of the legislation remains the same as it was before legislation, but no change in the law.

The fallacy of this argument lies in the assumption that Congress intended to limit the time in which an indictment might be found, whereas the intention was to limit the time that the accused might be *committed or held to bail pending action by the grand jury.* The statute provides he shall not be so committed or held longer than nine months. This was a vital change in the existing law.

In support of the position that the discharge was from the offense and final, the Court of Appeals further said:

> It is provided in the section that the criminal term of the Supreme Court of the District, or in vacation any of its justices, "upon good cause shown in writing, may from time to time enlarge the time for taking action in such case by the grand jury."
>
> If the second meaning be attached to the statute, to wit, that the discharge is only from the pending prosecution, this proviso turns out not only unnecessary, but idle and useless; for if the discharge is only from the pending accusation, this leaves the grand jury already free to indict at a later period, because, according to the construction, it has never been deprived of that power. There is neither need nor reason for vesting in the court power to extend the time for action if action may be had independent of any extension; the fact that power to extend the time for action is conferred, and is to be granted only "upon good cause shown in writing," shows the legislative mind to have understood that unless there was extension, the time for action has finally expired with the nine months.

Here again is the erroneous assumption that Congress intended to limit the time in which an indictment may be found. The purpose of the proviso is to afford the Government opportunity to enlarge the time during which the accused may be *committed or held to bail pending action by the grand jury*, not the time in which it might procure an indictment If the

grand jury fail to take action within nine months, then the accused is to be set free or his bail discharged—and that is as far as the statute pretends to go. It is silent as to the finding of an indictment after such release or discharge.

The period in which an indictment may be found is fixed by section 1044, Revised Statutes of the United States, in force in the District by section 1 of the code. Under that section an indictment for conspiracy must be found within three years. As construed by the Court of Appeals, section 939 of the code operates to amend or repeal section 1044 in cases where arrests are made, although there is no intimation of such intention. It is well settled that repeals by implication are not favored.

The Court of Appeals further suggests that if the discharge of the accused under section 939 be not from the offense and final, nothing will be accomplished thereby, as he may be immediately rearrested. This by no means follows, and if it did, would not be conclusive. It may be said, however, that since the statute contemplates that a person shall not be committed or held to bail pending action by the grand jury for a longer period than nine months, unless the time shall be enlarged as stated, if discharged under that section he could not be rearrested, unless the grand jury had in the meantime taken action by finding an indictment against him, or for other sufficient reasons.

The construction adopted by the Court of Appeals leaves one whose case has been acted upon by the grand jury, and the charges against him ignored, in a worse attitude than one whose case has not been investigated at all. The latter, after nine months, is to go scot free, while the former, although the charges against him have been found to be unwarranted, is still subject to indictment at any future time within the general period of limitation. Congress surely could not have intended this.

The meaning of section 939 is elucidated by another in the same chapter (31 Stat., 1339):

> SEC. 921. DISCHARGING DEFENDANTS DURING TRIAL. When two or more persons are jointly indicted the court may, before a defendant has gone into his defense, direct any such defendant to be discharged that he may be a witness for the United States. An accused party may also, when there is not sufficient evidence to put him upon his defense, be discharged by the court, or, if not discharged by the court, shall be entitled to the immediate verdict of the jury for the purpose of giving evidence for the other parties accused with him; and such order of discharge in either case, equally with the verdict of acquittal, *shall be a bar to another prosecution for the same offense.*

The care with which this section provides that a discharge shall operate as an acquittal and bar prosecution negatives the idea that the same effect was intended to follow from the provision in section 939 that an arrested party, for failure of the grand jury to act,

"shall be set free or his bail discharged." Such a purpose should not be lightly assumed. It means absolute immunity to violators of the law, within a brief period, without satisfactory reason therefor. A defendant discharged under section 921, secures immunity in the one case by becoming a witness for the Government, in the other, because there was no sufficient evidence to warrant the charge. But upon what ground can it be said that one within the provisions of section 939 is entitled to immunity? The law provides that one charged with crime shall not be unduly inconvenienced, and therefore if his case be not seasonably acted upon by the grand jury, he shall be set free or his bail discharged. But such inconvenience should not be taken as a satisfaction of all punishment. Suppose the party arrested had committed willful murder, for which there is no limitation (see sec. 1043 R. S.), under the view taken below failure of the grand jury to act within nine months might operate as an acquittal and put the murderer at large.

The Authorities—Further Prosecution.

The Court of Appeals cites no authority in support of its view that the discharge under section 939 is from the offense and final. Similar statutes exist in many of the States. Some of them state in express terms that in case of a failure to find or prosecute an indictment within a specified time the accused shall be discharged of the offense. Thus the Georgia statute provides that he "shall be absolutely discharged

and acquitted of the offense charged in the indictment;" the statutes of other States that "he shall be discharged so far as relates to the offense for which he was committed." Such expressions have been held to amount to an acquittal and bar further prosecution.

Jackson v. *State*, 76 Ga., 551, 565.
Steward v. *State*, 13 Ark., 720, 730.
Johnson v. *State*, 42 Ohio St., 209.
State v. *Wear*, 145 Mo., 162.

But, except for a mere dictum in *McGuire* v. *Wallace* (109 Ind., 284, 289), the decisions are uniform that a simple direction that the prisoner "shall be discharged" for failure to bring him to trial within the time specified does not operate as an acquittal and bar further prosecution.

In *McGuire* v. *Wallace* the Supreme Court of Indiana held that it had no authority, upon *habeas corpus*, to review the judgment of the trial court refusing to discharge the petitioner for want of prosecution, incidentally observing that a discharge under the statute of that State amounted to an acquittal of the offense, basing this statement upon the Ohio decisions without noting the difference in the language of the Ohio statute.

In *State* v. *Wear* (*supra*) the Supreme Court of Missouri refers to the difference between the New Jersey statute, which provides that the defendant "shall be discharged," and the Missouri statue, which provides that he shall be "entitled to be discharged *so far as relates to such offense*," and observes that the former "intends

only a simple discharge without any finality to it." (145 Mo., 190.)

In *In re Edwards* (35 Kan., 99, 103), the Supreme Court of Kansas distinguished its statute, which provides that the "accused shall be discharged so far as relates to such offense," for delay in bringing to trial after indictment found or information filed, from the Illinois and Colorado statutes:

> The statutes construed in the cases of *Brooks* v. *People* (88 Ill., 327) and *In re Garvey* (4 Pac. Rep., 758; 7 Colo., 502) do not provide for any discharge of the offense, but operate merely to set the prisoner at liberty. In this State the statute provides for the absolute discharge of the prisoner from the offense, and therefore Illinois and Colorado decisions are not applicable.

But in that case the court also said that, since a discharge under the Kansas statute would operate as an acquittal, "there is good reason for holding that the prisoner ought not to be entitled to his discharge unless he brings himself without the spirit of the statute;" that "the statute was designed to shield the innocent from oppression, but not to enable the guilty to escape"—citing *Steward* v. *State* (13 Ark., 720), and *Clark* v. *Comth.* (29 Pa. St., 129). Accordingly, although the statutory period had elapsed, the court directed that the petitioner be remanded to custody, because "he has not seemed anxious for any hearing of the case against him upon its merits, but has only desired a discharge, without any trial."

In the present case respondents remained silent until they were brought to trial, and then demanded their release.

Section 7, *habeas corpus* act, 31 Charles II, chap. 2, provides that if any person committed for treason or felony, upon his prayer or petition in open court to be brought to trial, shall not be indicted the next term, the courts are authorized and required, upon motion by the prisoner or some one in his behalf, "to set at liberty the prisoner upon bail," and if not indicted and tried the second term after his commitment, or upon his trial acquitted, "he shall be discharged from his imprisonment."

The English decisions do not indicate the effect, under this act, of a discharge for failure to prosecute.

In *King* v. *Platt* (1 Leach's Crown Law, 157), justices of gaol delivery held that they had no authority, under the act, to admit to bail one committed for high treason or to discharge him for want of prosecution. But they said (p. 170):

> The prisoner may apply, under the *habeas corpus* act, to the court of King's Bench, to be tried or bailed; and if not tried in two terms after his prayer is received, he will be entitled to his discharge.

The requirement that after the lapse of two terms without trial the prisoner shall be discharged from imprisonment would seem to be imperative. But in *Rex* v. *Walter* (8 Mod., 5), the court, while stating that, under the statute, a prisoner ought to have been

tried within two terms after he was indicted, "was of opinion to bail him; but he having no bail was remanded." See also *Regina* v. *Bowen*, 9 C. & P., 509.

The statute of 31 Charles II was formally reenacted in some of the American colonies; in others it was merely recognized as being in force. (Church on Habeas Corpus, c. 1, sec. 38 et seq.; Hurd on Habeas Corpus, c. 5.)

In Maryland, Hurd states (p. 113), "there was no provincial act upon the subject, and yet it was recognized and practically adopted." It would seem to follow that the statute was and is in force in the District of Columbia, unless inconsistent or replaced by some provision of the Code. (See sec. 1 of the Code, 31 Stat., 1189.)

The English statute was reenacted in South Carolina at an early date, and has been construed by its courts. In *State* v. *Fley*, 2 Brevard, 338, 348, the court said:

> The discharge of Rochelle under the *habeas corpus* act can not, upon any sound principle, be considered as an acquittal from the charge, so as to bar a subsequent prosecution for the same offense. The act was made to secure the citizens of the State from vexatious arrests and imprisonment, and not to protect them from prosecutions for crimes actually committed. The act in favor of liberty was sufficient to operate the discharge of the prisoner, Rochelle, from his former imprisonment, when the State's officer was not ready to produce the proofs of his guilt; but it would be monstrous to say that such discharge should shield him from a sub-

> sequent prosecution, when the proofs of his guilt are ready to be produced.

Approved in *State* v. *Williams*, 35 S. C., 163.

The statute of 31 Charles II was also reenacted in New Jersey, and in *State* v. *Garthwaite*, 23 N. J. L., 143, 147, the phrase "discharged from his imprisonment" was construed by the highest court of that State:

> The discharge, in its very terms, is to be from imprisonment. And of necessity it can not be from the indictment nor from its penalty, because, in contemplation of the law, the discharge may be by virtue of a writ of *habeas corpus* by authority of a tribunal having no cognizance of the indictment or of the crime.

The present New Jersey statute provides, where trial is delayed, that "the defendant shall be discharged." This is held to grant mere release from imprisonment, and not immunity from further proceedings.

State v. *Garthwaite*, supra.
Apgar v. *Woolston*, 43 N. J. L., 67.

The difference between a provision for discharge from imprisonment and one for discharge from crime is well illustrated in the Virginia statutes and decisions. Section 28, code of 1819, c. 169, provided:

> Every person charged with such crimes (treason or felony), who shall not be indicted before or at the second term after he shall have been committed, unless the attendance of the witnesses against him appears to have been prevented by himself, shall be discharged from his

> imprisonment, if he be detained for that cause only; and if he be not tried at or before the third term after his examination before the justices, he shall be forever discharged of the crime; unless, etc.

The distinction between failure to indict and failure to try is carried through subsequent statutes down to the present, with slight changes in phraseology. (See the successive statutes set out in note to Adcock's case, 8 Gratt., 662; and the two provisions are separated in the code of 1873, c. 201, sec. 13, c. 202, sec. 34.)

Under that legislation, where one is not brought to trial in due time, he "shall be forever discharged of the crime;" and this imports immunity from future prosecution. (*Green* v. *Com'th*, 1 Rob., 731.) But where the delay is in finding an indictment, the accused is "discharged from his imprisonment," and remains liable to subsequent arrest and indictment. (*Waller* v. *Com'th*, 84 Va., 492, 494.)

To the same effect are the decisions in California and Mississippi.

> *In re Begerow*, 133 Cal., 349; 136 Id., 293.
> *Byrd* v. *State*, 1 How. (Miss.), 163, 171.

The language of the District code is not that the accused "shall be discharged," but that he "shall be *set at liberty* or *his bail discharged*," as the case may be. The implication that this language was intended to operate as an acquittal is less strong than where a statute provides that the accused "shall be discharged."

The Colorado statute provides that the accused

"shall be set at liberty." This has been held to entitle the prisoner to freedom, but not to relieve him from prosecution. The distinction between such language and that used in statutes, a discharge under which has been held to operate as an acquittal, was clearly pointed out in *In re Garvey* (7 Colo., 502, 509).

All doubt would seem to be removed by the alternative in section 939, "or his bail discharged." Mere release of an accused from bail was surely never intended to operate as an acquittal and a bar to further prosecution.

Subsequent Arrest.

Perhaps one set free or whose bail has been discharged under section 939 may not be rearrested for the same offense until indicted, unless other reasons imperatively require it. But, if it were otherwise, that would not justify a different construction from the one asked by the Government. It has never been held that the discharge of a person from one confinement, which was originally or had become illegal, precludes a second or a third arrest for the same cause.

One released from imprisonment upon *habeas corpus* may be immediately rearrested for the same offense upon new process issued by a court of competent jurisdiction. Section 6 of the *habeas corpus* act of 31 Charles II provides:

> That no person or persons which shall be delivered or set at large upon any *habeas corpus* shall at any time hereafter be again imprisoned or committed for the same offense by

> any person or persons whatsoever, *other than by the legal order and process of such court wherein he or they shall be bound by recognizance to appear, or other court having jurisdiction of the cause.*

The *habeas corpus* act was intended to prevent arbitrary arrest and commitment by the Crown; not to interfere with, but to facilitate, the trial of affenders.

In *Ex parte Milburn* (9 Pet., 709) Mr. Justice Story, speaking for the court, said:

> A discharge of a party, under a writ of *habeas corpus*, from the process under which he is imprisoned, discharges him from any further confinement under the process; but not under any other process which may be issued against him under the same indictment.

One held under illegal sentence is entitled to release on *habeas corpus*, but he may be at once retaken and held for new sentence.

In re Bonner, 151 U. S., 242.

Nor does a discharge on *habeas corpus* preclude an investigation by the grand jury; release from imprisonment does not wipe out the offense.

2 Spelling, Extraordinary Relief, sec. 1227.

Abandonment of Prosecution.

The fact that section 939 provides that "the prosecution of the charge shall be *deemed* to have been abandoned," furnishes no argument in support of the contention that a discharge bars further prosecution.

An *actual* abandonment does not have that effect. Even a formal *nolle prosequi* leaves the accused liable to new indictment and to all the consequences of his offense as if there had been no abortive prosecution.

1 Chitty Crim. Law, 480.
1 Bishop Crim. Proc. (3d ed.), sec. 1395.
Goddard v. *Smith*, 6 Modern, *262.
Dealy v. *United States*, 152 U. S., 542.

The statute merely makes the presumptive abandonment of the charge upon which the party was arrested ground for his being set free or having his bail discharged. The charge having been abandoned—actually or presumptively—there is no longer any justification for commitment or bail. But if a crime has been committed, and can at any later time within the period of limitation be proved, the public interest requires that the Government have an opportunity to do so, whether the charge had theretofore been actually or presumptively abandoned.

Abandonment can not be pleaded after indictment.

After indictment it is too late for the accused to plead abandonment of the prosecution. The purpose of the statute being simply to prevent one from being committed or held to bail pending action by the grand jury for an undue length of time, and not to defeat indictment, but rather to promote it, he must take advantage of the statute while the delay exists.

It is well settled that statutes providing for the discharge of a prisoner for failure to prosecute do not

operate of themselves, but require that he demand and receive an order of court to make them effective.

Stewart v. *State*, 13 Ark., 720.
Dillard v. *State*, 65 Ark., 404.
People v. *Hawkins*, 127 Cal., 372.
McGuire v. *Wallace*, 109 Ind., 284.
State v. *Cox*, 65 Mo., 29.
Ex parte Walton, 2 Wharton (Pa.), 501.
Bennett v. *State*, 27 Tex., 701.
Hernandez v. *State*, 4 Tex. App., 425.

The *habeas corpus* act of 31 Charles II requires prayer or petition in open court.

They are not statutes of limitation; failure to comply with them is a mere irregularity.

People v. *Rulloff*, 5 Parker's Crim. Rep. (N. Y.), 77.

Discharge is a matter of discretion.

Patterson v. *State*, 49 N. J. L., 326.
State v. *Nugent*, 71 Mo., 136.
In re Edwards, 35 Kan., 99.

Under section 939, one committed or held to bail must apply to a court of justice of competent jurisdiction—and the better rule would be that he must apply to the court having jurisdiction of the offense—for an order directing his discharge or releasing his bail. The warden of the jail can not determine whether the conditions for such relief have been complied with. Whether or not the grand jury has acted, either by returning an indictment or ignoring the charge, is a matter peculiarly within the knowledge of the trial court. In the exercise of the discretion which

the court must have, it would not, unless it absolutely misconstrued the statute, direct that the accused be released or his bail be discharged, if it appeared at the time of his application that an indictment had been found against him within the period of limitation fixed by law.

It is respectfully submitted that the judgment of the court below should be reversed.

J. C. McREYNOLDS,
Assistant Attorney-General.

WILLIAM R. HARR,
Special Assistant to the Attorney-General.

FEBRUARY, 1905.

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FILED
FEB 25 1905
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 438.

UNITED STATES

vs.

GEORGE E. CADAAR AND OTHERS.

BRIEF ON BEHALF OF EDWARD PARKER, ONE OF THE RESPONDENTS.

H. PRESCOTT GATLEY,
Attorney for Edward Parker, One of the Respondents.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 14901

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STATEMENT OF FACTS.

On the 25th day of April, 1901, the defendant Edward Parker, together with three others, was arrested on the charge of conspiracy, and on the same day was held to await the action of the grand jury upon such charge. On April 27, 1901, he entered into a recognizance, with surety, conditioned for his appearance in the supreme court of the District of Columbia at the then present or any future term thereof until the said cause should be finally disposed of, and to answer such charge of conspiracy.

No further action was taken in the case until the 31st of March, 1902, when an indictment for conspiracy against him and the three others was filed in that court.

On April 7, 1902, he was arraigned upon the indictment and entered a plea of not guilty. This plea was subse-

quently, on May 1, 1902, withdrawn and a motion to quash the indictment filed.

The grounds upon which this motion was based were:

> "*First.* Because said indictment was not returned into court within nine months after the 25th day of April, 1901, on which said day this defendant was held to bail to await the action of the grand jury on said charge of conspiracy; the time for taking action in such case not having been enlarged by this court, or any justice thereof (as appears from the record herein), as provided by section 939 of the act to establish a code of law for the District of Columbia, approved March 3, 1901.
>
> "*Second.* Because of other errors, defects and omissions appearing on the face of the record in this case."

On the 3d day of March, 1901, nearly two months *before* the arrest and holding to bail of the defendants herein, Congress passed an act providing a code of law for the District of Columbia, to go into effect and operation from and after the 1st day of January, 1902.

By section 939 of the act it is provided:

> "SEC. 939. *Abandonment of Prosecution.*—If any person charged with a criminal offense shall have been committed or held to bail to await the action of the grand jury, and within nine months thereafter the grand jury shall not have taken action on the case, either by ignoring the charge or by returning an indictment into the proper court, the prosecution of such charge shall be deemed to have been abandoned and the accused shall be set free or his bail discharged, as the case may be:
>
> "*Provided, however,* That the supreme court of the District of Columbia holding a special term as a criminal court, or, in vacation, any justice of said court, upon good cause shown in writing, and, when practicable, upon due notice to the accused, may from time to time enlarge the time for the taking action in such case by the grand jury."

It was upon this section that the motion to quash was based.

Almost a year after the motion to quash was filed it was heard by the supreme court of the District, and sustained.

From this order the Government prosecuted an appeal to the Court of Appeals, and on June 30, 1904, the ruling of the lower court was affirmed.

Subsequently the Government applied to this court for a writ of certiorari to review the decision of the Court of Appeals, which application was granted.

ARGUMENT.

Section 939 of the Code applies to cases pending at the time it went into effect, viz., January 1, 1902.

It is perfectly manifest from the language used in the above section that Congress intended it should apply to cases pending when the Code should go into effect and operation, for it will be noted that the language used is "that if any person *shall have been* committed," etc. * * * "and within nine months *thereafter*, the grand jury *shall not have* taken action on the case," etc. If Congress had intended that this section should apply only to cases arising after the 1st of January, 1902, it would have provided that *from and after* that date if any person charged, etc. The language used, however, negatives this idea, and clearly shows, as before stated, that it was the intention of Congress that it should apply to all cases pending when the Code went into effect.

As if to remove any doubt upon this question it is provided in section 1638 of the Code:

> "That the provisions of this Code relating to procedure or practice and not affecting the substantial rights of parties shall apply to pending suits or proceedings civil or criminal."

And we find section 939 to be the last section in chapter 20 of the Code, entitled "CRIMINAL PROCEDURE."

The position of the Government in contending that section 939, relating as it does to practice and procedure (Kring *vs.* Missouri, 107 U. S., 226), does not apply to this case because it was pending at the time the Code went into effect is absolutely inconsistent, since it avails itself of the provisions of section 935 of the same chapter to secure a review of the judgment of the trial court in this case on appeal. Section 935 gives to the Government a right of appeal in criminal prosecutions, a right which it did not have before the passage of the Code.

Hence it follows that if the provisions of chapter 20 do not apply to cases pending at the time the Code went into effect, the Court of Appeals was without jurisdiction to review the judgment of the lower court in this case, and should have dismissed the appeal.

In holding that section 939 applied to the case at bar the court did not in any way prejudice the rights of the Government, because, in the first place, there was a reasonable time after the 1st of January, 1902, and before the expiration of the nine months after the defendants were held to bail to await the action of the grand jury, within which the Government could have indicted them.

It is undoubtedly within the power of the legislature to pass statutes of limitation to change the periods of statutes of limitations previously fixed, and to make such statutes or changes applicable to existing rights or pending actions. The language of the statute must control, and if the intent of the legislature appears to be to make the new statute applicable to existing rights or pending causes of action, such effect must be given accordingly.

Sohn *vs.* Waterson, 17 Wall., 596.
Koshkonong *vs.* Burton, 104 U. S., 668.
Marx *vs.* Hanthorn, 148 U. S., 173.

The new statute of limitations made to take effect at a later date is to be regarded as embracing causes of action accruing prior to its enactment and pending at the time it is to take effect, the period of time between its enactment and the date when it is to become effective being presumed to have been intended by the legislature for the beginning of such actions or prosecutions as can be barred by the new statute upon its taking effect, and as due notice that such actions would be barred if not begun or proceeded with within that period.

Wrightman *vs.* Boone Co., 82 Fed. Rep., 413.

Statutes in the nature of limitations which affect existing rights should afford reasonable time for the commencement of an action before the bar takes effect.

Terry *vs.* Anderson, 95 U. S., 628.

Koshkonong *vs.* Burton (*supra*).

Where a new act is made to take effect at a date appreciably later than its passage, the date of passage is to be taken as the starting point in determining whether a reasonable time has been allowed, and not the date on which it is to take effect.

Ross *vs.* Duval, 13 Pet., 45.

Wrightman *vs.* Boone Co. (*supra*).

Hart *vs.* Bostwick, 14 Fla., 180.

Hedger *vs.* Rennaker, 3 Met. (Ky.), 255.

State *vs.* Jones, 21 Md., 432.

Pierce *vs.* Tobey, 5 Met. (Mass.), 168.

Bigelow *vs.* Bemis, 2 Allen, 496.

Stine *vs.* Bennett, 13 Minn., 153.

Duncan *vs.* Gaslin, 20 Neb., 347.

Osborn *vs.* Lindstrom, 9 N. Dak., 1.

Merchants' Nat. Bank *vs.* Braithwaite, 7 N. Dak., 358.

Korn *vs.* Brown, 64 Pa. St., 55.

Eaton *vs.* Manitowoc Co., 40 Wis., 668.

In the second place, if the Government found that the time left was not sufficient to enable it to procure an indictment within the nine months limited by section 939, all that was necessary for it to do, under the provisions of the section, was to make such showing in writing to the court and have the time enlarged by the court. By this means it could have extended the time indefinitely, provided they made such a showing as would justify it.

Having failed to have the time extended within the nine months limited by the section, the Government, by its own laches, lost the right to do so.

District of Columbia *vs.* Roth, 18 D. C. App., 547.

Section 939 of the Code is a special statute of limitations.

This section of the Code was intended as a special statute of limitations, supplemental to the general statute of limitations in force in the District. This latter statute is found in section 1044, R. S. U. S., and provides:

> "No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section one thousand and forty-six, unless the indictment is found, or the information instituted within three years next after such offense shall have been committed."

This section was continued in force by section 1 of the Code.

There is no conflict whatever between these two provisions of the law. Section 1044, R. S. U. S., operates from the time of the commission of the offense, while section 939 of the Code operates from the time the Government lays hand upon the defendant and commits him to jail or holds him to bail to await the action of the grand jury upon the charge of such offense.

The two provisions of law are harmonious, and both should be given effect.

The language of section 939 is plain, simple, and unambiguous, and there is no difficulty in determining what the legislature meant by it.

It clearly means that in cases where a person is charged with a criminal offense and is committed to jail or held to bail to await the action of the grand jury upon such charge, unless the grand jury shall ignore the charge or find an indictment thereon within nine months thereafter, the prosecution of such charge shall be deemed to have been abandoned, relinquished, and given up. In other words, that unless the defendant is indicted within nine months after his commitment or admission to bail, in the absence of an enlargement of such time, the Government is thereafter barred from the prosecution of such charge. It is a wholesome law, and affords a valuable protection to the citizen.

This section of the law requires a greater degree of diligence on the part of the Government in the prosecution of criminal offenses than was required of it prior to its enactment. Undoubtedly the legislature had the right to do this, and if the Government failed to exercise the diligence required of it by the law, and thereby placed itself in a position where it could not further prosecute the charge, it has no one to blame but itself. It was a matter the defendant had nothing to do with, and he is in no way responsible for the predicament of the Government in the case.

As was said in the case of Durham *vs.* The State of Georgia, 9 Ga., 306, in construing a law of that State having in view the same objects as section 939 of our Code:

> "It was wisely and humanely framed to carry into effect that provision of the constitution which declares, that 'in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial.' And this construction places no great burthen upon the State. She has at her command ample means of collecting testimony and preparing for trial; she can

> recognize witnesses to appear and testify; she can coerce their personal attendance from all parts of the State, and provision is made to defray their expenses; she cannot be taken by surprise, as six months' previous notice has to be given that a trial will be claimed. If, under such circumstances, she is not ready, the legislature, to remedy the evil under the English practice, of suffering the Crown to delay the prosecution until it suited its purposes to terminate it, has interposed this statutory bar or limitation."

Section 939 was enacted to fit particular facts and conditions, and surrounds the prosecution of charges of criminal offenses with certain limitations. It requires the Government to *enforce its remedy* within a limited period of time. If it fails to do this, its remedy is gone.

It will not do to argue that the defendant is taking advantage of a technicality, or that a guilty man may escape on a mere technicality. The defendant in this case, as in all cases, is by the law presumed to be innocent, and that presumption clings to him until his guilt has been established.

The defense of the statute of limitations is a substantial one, so regarded by the highest court in this country, and is founded upon sound principles of public policy.

It is asserted by the Government that the effect of section 939 of the Code is to change the statute of limitations in respect of crimes from three years, as provided in section 1044, R. S. U. S., to nine months whenever the accused shall have been committed or held to bail.

This is by no means a fair statement, nor is it true in point of fact.

As before stated, under the provisions of section 939 the court has the power to enlarge the time, and the extent to which it may so enlarge the time is not limited. It might enlarge the time beyond the period of three years fixed by section 1044.

On the other hand, suppose in the case at bar, before the

expiration of the nine months, the court upon applications had from time to time enlarged the time to a period exceeding three years, and after that period an indictment had been returned into court.

Suppose, further, that to this indictment the defendant had pleaded the provisions of section 1044, R. S. U. S., in bar to the indictment, would the Government have thrown up its hands and admitted the plea good? On the contrary, it would have maintained with all the force at its command that the plea was bad and constituted no defense.

It follows, therefore, that the Government is in no degree prejudiced by the provisions of section 939 of the Code.

Section 939 relates to the offense charged, as well as to the person of the defendant.

It is contended by the Government that this section relates only to the person of the defendant, and to his liberty if committed or to the discharge of his bail in case he has given bail, and not to the offense charged. This contention is clearly untenable, for the language of the section demonstrates that the legislature had in mind both subjects.

It provides that if any person *charged with a criminal offense* shall be committed, etc., and within nine months thereafter the grand jury shall not have found an indictment, *the prosecution of such charge—i. e.*, the criminal offense charged—shall be deemed to have been abandoned, and thereupon one of two things shall be done, viz., that the accused be set free or his bail discharged, as the case may be.

In order to support this theory of the Government it is absolutely necessary to ignore one of the most important clauses of the section—*the prosecution of such charge shall be deemed to have been abandoned.*

There is no rule of statutory construction that would justify the court in doing this.

> "It is a cardinal rule of statutory construction that significance and effect, shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, section 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant.'"
>
> Market Co. *vs.* Hoffman, 101 U. S., 112, 115.

> "It is well-settled law that every word of a statute is to receive effect and to be construed according to its ordinary and natural signification, and the strict letter is not to be departed from without good and sufficient cause."
>
> Mackall *vs.* District of Columbia, 16 App. D. C., 301.

Again, if the contention of the Government in this respect be correct, the last-mentioned clause could have been entirely omitted from the section, in which event it would read as follows:

> "If any person charged with a criminal offense shall have been committed or held to bail to await the action of the grand jury, and within nine months thereafter the grand jury shall not have taken action on the case, either by ignoring the charge, or by returning an indictment into a proper court, the accused shall be set free or his bail discharged, as the case may be: *Provided*," etc.

This illustration, it is submitted, clearly shows that the legislature had more in mind than the mere release of the defendant from imprisonment or the exoneration of his bail.

It had in mind the limiting of the time within which the grand jury might take action on a criminal charge after commitment of the defendant or his holding to bail, and it so limited the time to nine months. This, to the mind of the legislators, was a sufficient time for a charge of a criminal

offense to hang over the head of a presumably innocent man without action by the grand jury.

In order, however, to prevent the ends of justice from being defeated by the inability of the grand jury to act within the time limit, by reason of the absence of witnesses or what not, it provided a means by which such time could be enlarged. This shows that it was the intention of the lawmakers to bar further prosecution of such charge, unless the action of the grand jury in returning an indictment into the proper court was taken within the nine months or the extension of such time as fixed by the court.

It is contended by the Government that even though it fail to observe the provisions of this section and fail to indict within the time limited therein, or any extension of such time by the court, it may do so at any future time within the three years limited by the general statute of limitation. The answer to this is that the only extension of time contemplated by the section is to be had at the hands of the court, and then, too, after a showing of good cause in writing. No such extension was sought or had in this case.

If it was intended that the grand jury could take action after the expiration of nine months without any enlargement of the time, what was the necessity of the addition of the proviso to the section? None whatever. And if the position of the Government in this respect be correct, then it must be held that the language of the proviso is but a mass of idle words, without meaning and without bearing or relation to the other portions of the section.

In support of its contention counsel for the Government cites authorities holding that a *nolle prosequi* does not bar a further prosecution of the offense. This is begging the question at issue.

Section 939 does not purport to cover or apply to such a case. It may well be that in a case where an indictment is returned within the time limited therein, which is afterwards *nolle prossed*, the Government might further prosecute.

In such a case this contention would apply with greater force, for the *diligence* required of the prosecution by the law would be present. In the case at bar it is conspicuous by its absence.

In the case of U. S. *vs.* Hayman, 32 W. L. R., 491, the defendant was, on March 22, 1902, arrested for violating section 4746, R. S. U. S., and held to bail to await the action of the grand jury. Upon July 14, 1902, an indictment was returned against him by the grand jury, and three days later he was released on bail.

Upon April 20, 1903, more than nine months later, a second indictment was returned against him, charging, in different language, the same offense covered by the first indictment.

To this latter indictment the defendant interposed a plea in abatement based upon section 939 of the Code.

The trial court sustained this plea, but on appeal the Court of Appeals reversed the judgment, holding that:—

> "All cases wherein the grand jury has within nine months taken action one way or another, either by ignoring or by indicting, are exempted from the operation of the section and are left within the operation of the rules of the common law, according to which the pending of one indictment has nothing to do with the question of the propriety or validity of further indictments for the same offense."

The court in its opinion further says:

> "The grand jury did take action on the case within nine months, for it returned the first indictment within four months from the holding over to await its action. The question is not whether a second indictment was returned later than nine months after a holding over, but is whether such proceedings were had by action within nine months as prevented the application of section 939 to the case. The grand jury having taken action by indicting within nine months, the provisions of section 939 never attached to, and had no operation upon the case."

As this case turns upon the proper meaning of the language used in section 939 of the Code, it is difficult to find authority directly in point. While many of the States have laws the objects of which are similar to the objects of our law, yet the language of those laws is so different from ours that the adjudicated cases shed very little light on the subject.

The following cases, it is submitted, support the contention of the respondent:

Jackson *vs.* State, 76 Ga., 551.
Stewart *vs.* State, 13 Ark., 720.
Johnson *vs.* State, 42 Ohio St., 209.
State *vs.* Wear, 145 Mo., 162.
McGuire *vs.* Wallace, 109 Ind., 284.
In re Edwards, 35 Kansas, 103.

The decisions of the courts of the States of Virginia, Mississippi, California, South Carolina, and Colorado, cited by the Government, are not applicable to this case. An examination of the statutes of those States discloses that they relate solely and exclusively to the discharge of the defendant from imprisonment. There is no clause in those statutes, as is contained in ours, with regard to the abandonment of prosecution of the charge, and no presumption of such abandonment is created in them by the lapse of time.

The respondent is not guilty of laches and has waived none of his rights.

It is further contended by the Government that the defendant has lost his right to avail himself of the provisions of section 939 as a defense:

First. Because he entered a plea of not guilty to the indictment.

Second. Because he did not move to discharge his bail immediately after the expiration of the nine months.

With regard to the first position taken, the record shows that the plea of not guilty was withdrawn and the motion to quash filed. Presumably, and it is the fact, the right to do this was reserved at the time of arraignment.

No objection was made at the time by the Government to the withdrawal of the plea and no exception taken to the ruling of the court in permitting it to be done.

This action of the trial court was one entirely within its discretion and is not subject to review on appeal.

The second reason is equally without force. The Government says that it is too late for the defendant to put forth the defense of the statute after an indictment has been found, even though it be found after the period of nine months limited by the statute. Can this be true? Is it incumbent upon a defendant to plead the statute of limitations until some action in contravention of his right is taken? Is it possible for him to do so? Certainly not without "putting the cart before the horse."

Then, again, the section requires no action to be taken by the defendant.

If the case is not ignored or an indictment returned within nine months without enlargement of such time by the court, the law fixes the status of the prosecution—it is deemed to have been abandoned—and provides in imperative terms that the accused *shall* be set free or his bail discharged, as the case may be.

The charge of laches made against the respondent is utterly without foundation.

By the failure to take action in his case he was by the Government lulled into a feeling of security, and he assumed, as the law says he might, that the prosecution of the charge had been abandoned, and rested upon the defense given him by that section of the law.

So soon, however, as the Government sought to revive the prosecution of the charge of the offense which was dead under the law, he asserted his defense.

It is respectfully submitted that there is no error in the record, and that the judgment of the court below should be affirmed.

H. PRESCOTT GATLEY,
Attorney for Edward Parker, One of the Respondents.

Supreme Court of the United States.

No. 438.—October Term, 1904.

The United States, Petitioner, *vs.* George E. Cadarr, Edward Parker, John J. Keating and John N. Myers.	On writ of certiorari to the Court of Appeals of the District of Columbia.

[April 3, 1905.]

Mr. Justice Day delivered the opinion of the Court.

The respondents were indicted for conspiracy in the District Court of the District of Columbia on March 31, 1902. On April 4, 1902, Cadarr, Keating and Myers were arraigned and entered pleas of not guilty. On April 7, 1902, Parker entered a plea of not guilty; on May 1, 1902, he withdrew this plea and filed a motion to quash. The ground of this motion was that the indictment was not returned to the court within nine months from the 25th day of April, 1901, on which day the defendants were held to bail to await the action of the grand jury on the charge of conspiracy, the time for taking action in the case not having been extended by the court or any judge thereof, as provided in section 939 of the act to establish a code for the District of Columbia, approved March 3, 1901. The motion was sustained, and it was directed that Parkers' bail be discharged, and all the defendants were allowed to go without day.

Upon appeal by the United States, the Court of Appeals affirmed this judgment. Thereupon this writ of certiorari was granted.

This case raises the question whether section 939 of the Code of the District of Columbia is intended to bar further prosecution of crimes and offences where the grand jury has failed to act thereon within the period named in the statute, or whether the failure to take such action is intended to and does end further prosecution so as to discharge the accused from bail or from imprisonment in cases of commitment. The District Court, whose judgment was sustained by the Court of Appeals, construed the statute as one of limitations, and held that failure to take action within the period limited was a final bar to further prosecution. The section directly involved is number 939 of the District of Columbia Code, and is as follows:

"Sec. 939. *Abandonment of prosecution.*—If any person charged with a criminal offence shall have been committed or held to bail to await the action of the grand jury, and within nine months thereafter the grand

jury shall not have taken action on the case, either by ignoring the charge or by returning an indictment into the proper court, the prosecution of such charge shall be deemed to have been abandoned, and the accused shall be set free or his bail discharged, as the case may be: *Provided, however*, That the Supreme Court of the District of Columbia, holding a special term as a criminal court, or, in vacation, and any justice of said court, upon good cause shown in writing, and when practicable, upon due notice to the accused, may from time to time enlarge the time for the taking action in such case by the grand jury." (31 Stat. 1189, 1342.)

The general statute of limitations is in force in the District and is section 1044, Revised Statutes of the United States, which is as follows:

"No person shall be prosecuted, tried, or punished for any offence, not capital, except as provided in section one thousand and forty-six, unless the indictment is found, or the information instituted within three years next after such offence shall have been committed."

It is the contention of respondents' counsel that section 939 operates as a special statute of limitation for cases within its terms wherein the accused has been arrested and committed to prison or released on bail. On the other hand, the Government contends that it is not a statute of limitation but is intended to limit the time within which the grand jury must act upon a charge upon which the accused has been arrested and committed or admitted to bail. At the common law and in the absence of special statutes of limitations the mere failure to find an indictment will not operate to discharge the accused from the offence nor will a *nolle prosequi* entered by the Government or the failure of the grand jury to indict. It is doubtless true that in some cases the power of the Government has been abused and charges have been kept hanging over the heads of citizens, and they have been committed for unreasonable periods, resulting in hardship. With a view to preventing such wrong to the citizen, statutes have been passed in many states similar to the one under consideration, in aid of the constitutional provisions, national and state, intended to secure to the accused a speedy trial These statutes differ so much in purpose and phraseology that we cannot derive much aid from decisions under them in determining the correct construction of the one under consideration. With a few exceptions, they relate to the bringing to trial of the accused after indictment found, and are intended to speed the trial of the cause. Whether the failure to bring on the trial within the time limited shall have the effect of discharging the accused from further prosecution for the crime or offence, or shall operate merely to put an end to the pending prosecution, depends upon the terms used in the different statutes. Generally speaking, where the statute has provided that the discharge shall be from imprisonment or bail, without other language, it has been held not to operate as a statute of limitation. On the other hand, where the statute has provided that the failure to prosecute shall discharge

the accused so far as relates to the offence or from the crime, or he shall be acquitted of the offence charged in the indictment, failure to prosecute has been held to work a final discharge from the offence. Of the former class of cases are *State* v. *Garthwaite*, (3 Zab. 143;) of the latter class are *Ex parte McGehan*, (22 Ohio St. 442;) *Commonwealth* v. *Cawood*, (2 Va. Cases, 527;) *State* v. *Wear*, (145 Mo. 162;) *In re Edwards*, (35 Kan. 99–103.)

Turning to the particular statute under consideration, we find it is one in terms dealing with the status of the accused before indictment, after he has been committed or held to bail, and limits the time within which the grand jury may take action in such cases, whether the same results in ignoring the charge or the return of an indictment, and for the failure of the grand jury to take action within the time limited it is provided "that the prosecution of such charge shall be deemed to have been abandoned and the accused shall be set free or his bail discharged, as the case may be." This statute is not one of limitations, having effect upon the time in which the particular case may be prosecuted after the commission of the crime, but relates solely to the right of action by the grand jury as to one who has been committed or held to bail, wherein it is provided that the grand jury must act within the time named or the accused shall be set free, if imprisoned, or his bail discharged, if out on bond. We think this act was not intended to amount to a repeal *pro tanto* of the statute of limitation as contained in section 1044. For failure to indict within the time limited it is not provided, as in the cases where the statute has been construed to finally discharge the accused, that he shall be discharged from the offence, or that prosecution shall be forever barred, or he shall be deemed acquitted of the charge, but the result of the failure to prosecute has reference solely to the right in the pending prosecution to be freed, if imprisoned, or released from bail if under bond. If it had been the purpose of Congress to work so radical a change in the law as to end the right of further prosecution for the offence, we think it would have used language apt for that purpose, and the failure so to do indicates the intention to deal only with delays in action by the grand jury against persons under arrest or bonds. It is delay in the action of the grand jury, not the cutting down of the time of prosecution for offences, that is aimed at in this statute. Much stress is laid in the argument of counsel for the respondent upon the expression, "the prosecution of such charge shall be deemed to have been abandoned." But having reference to the previous part of the section, "such charge" relates to the one under which the accused has been committed or held to bail. The section prescribes the time within which the grand jury must act, and failing so to do, it is decreed that the prosecution shall be deemed to have been abandoned, and the effect upon the accused is not that he shall be discharged from prosecution for

the offence, but that he shall be set free, if imprisoned, or his bail discharged, if released on bond. The statute, it is observed, acts upon persons committed to prison, and, with like effect, upon those not incarcerated but only held to bail. We think it would require clear and specific language to indicate a legislative intent to bar the prosecution of all offences for the failure of the grand jury to act within nine months of the arrest of the accused, when the latter is at large upon bond. Again, if the contention of counsel for the accused is adopted, one will be discharged from further prosecution if the grand jury does not act upon the case, but if the grand jury does act, and the charge against the accused is found to be unwarranted, he is still subject to indictment until the three years of the statute of limitations have run, while the person whose case has not been wholly investigated will be forever released from the offence. Furthermore, section 1044 does not apply to capital offenses for such are expressly excluded from the operation of that section; but section 939, under consideration, makes no exception, and applies alike to all offences, and would operate to discharge a person accused of murder as well as one accused of petty theft. But, it is urged, section 939 permits the court to control and extend the time for taking action by the grand jury, thereby indicating the purpose of Congress to make this statute one of limitation. But we do not think the control of the time for taking action before the grand jury, given in this paragraph, enlarges the statute so as to make it applicable beyond the effect prescribed, which is upon the liberty of the accused or his freedom from the requirement to give bail. It is urged that if the construction insisted upon by the Government is given to this statute the accused may be discharged for failure of the grand jury to act, and then immediately rearrested, so that the statute will be defeated of its purpose to protect the accused. The question of whether one who has made application to the court, and been discharged for failure to find an indictment against him within the time limited, could again be arrested without indictment, is not involved in this case. The question is, Is the prosecution of the offence finally barred by this statute, so that the accused may not be held to answer upon an indictment found after the nine months' period has elapsed? It is urged by counsel for the respondents that the power given the court to enlarge the time for taking action by the grand jury is not limited, and that the time may be extended beyond the period of three years fixed by the general statute of limitations. We cannot agree to this contention. We think the general statute of limitations has not been repealed or modified by this section. The purpose of statutes of limitation is to finally bar all prosecution, and the purpose of the act under consideration, as we view it, is to control the prosecution by requiring action by the grand jury, and in default thereof release the person of the accused

or discharge him from bail, so far as the pending prosecution is concerned. While the construction of this section is not free from difficulty, we think the view herein expressed best effectuates the purpose and intention of Congress in enacting this statute, viewed in the light of the language used and the objects intended. This view of the case renders it unnecessary to pass upon other questions raised in the record.

The judgment of the Court of Appeals will be reversed and the cause remanded with directions to reverse the judgment of the Supreme Court of the District of Columbia and remand the cause to that court for further proceedings in accordance with this opinion.

True copy.

Test:

Clerk Supreme Court, U. S.